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WHEN: Tuesday, January 25, 2011
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741-6008



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DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS-2010-0089]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security/ALL-031 Information Sharing Environment Suspicious Activity Reporting Initiative System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled, "Department of Homeland Security/ALL-031 Information Sharing Environment Suspicious Activity Reporting Initiative System of Records" from certain provisions of the Privacy Act. Specifically, the Department exempts portions of the "Department of Homeland Security/ALL-031 Information Sharing Environment Suspicious Activity Reporting Initiative System of Records" from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: *Effective Date:* This final rule is effective December 21, 2010.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Ronald Athmann (202-447-4332), Office of Intelligence and Analysis, Department of Homeland Security, Washington, DC 20528. For privacy issues please contact: Mary Ellen Callahan (703-235-0780), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) published a notice of proposed rulemaking in the **Federal Register**, 75 FR 55290, September 10, 2010, proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/ALL-031 Information Sharing Environment (ISE) Suspicious Activity Reporting (SAR) Initiative System of Records. The DHS/ALL-031 ISE-SAR Initiative system of records notice was published concurrently in the **Federal Register**, 75 FR 55335, September 10, 2010, and comments were invited on both the notice of proposed rulemaking (NPRM) and system of records notice (SORN).

Public Comments

DHS received four comments on the NPRM. One commenter submitted the same set of comments for both the NPRM and the SORN.

All four comment submissions were in support of the DHS ISE-SAR Initiative and the proposed exemptions to the Privacy Act. One of the four commenters, BITS, a membership organization comprised of financial intuitions and financial-services vendors who own, operate, and/or develop critical infrastructure information systems, requested clarification on the scope of the ISE-SAR Initiative and the potential use of SAR filed by financial institutions and the proposed public-private partnership. In addition, the organization commented on the application of Freedom of Information Act (FOIA) exemptions particularly to any potential plans to collect cybersecurity information from private entities regarding cyber attacks. Lastly, the organization requested that the Department consider providing protections to private sector regulated entities that submit ISE-SARs to DHS.

BITS Comment: It is our understanding that the purpose of the DHS-ALL/031 ISE-SAR Initiative System of Records is to create a database of physical security threats and would not include the Bank Secrecy Act (BSA) related SARs filed with FinCEN. The ISE-Functional Standards do not expressly exclude BSA-related SARs, but the ISE Functional Standards

restrict the scope of a SAR to "official documentation of observed behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity." Likewise, the ISE-Functional Standards guidance criteria for determining whether a SAR constitutes an ISE-SAR, does not embrace financial crimes. Given these parameters, BITS questions whether BSA-related SARs may be included in the ISE-SARs database because of their potential nexus to terrorism information, as defined in the Intelligence Reform and Terrorism Prevention Act (IRTPA).

BITS respectfully asks the Department to clarify whether the proposed ISE-SARs database will include or exclude ISE-SARs filed pursuant to the BSA and Anti-Money Laundering regulations. The government's use of the classified sources and materials and aggregated BSA data could provide Federal agencies with a rich source of investigative leads relating to terrorism financing. These leads may flag previously unidentified anomalous behavior that becomes suspicious only when it is combined with aggregated investigative data sources, such as FinCEN's database of cross-border electronic funds transactions. BITS asks the Department to balance the potential benefits of this broad interpretation with the potential privacy, operational, and legal hazards.

Response: DHS participation in the Nationwide Suspicious Activity Reporting Initiative (NSI), which is overseen by the Department of Justice, adheres to the requirements established by the NSI requiring participants to apply the ISE-SAR Functional Standard Version 1.5 in determining whether a suspicious activity is an ISE-SAR. DHS would like to clarify that suspicious activities that meet the ISE-SAR Functional Standard Version 1.5 are not limited to physical security threats. Further, DHS submission of ISE-SARs to the NSI Shared Space does not explicitly exclude, nor does it include any specific category or source of information; rather DHS submissions of ISE-SARs to the NSI Shared Space adhere to the ISE-SAR Functional Standard Version 1.5. For further clarification on the scope and application of the ISE-SAR Functional Standard Version 1.5, DHS recommends that BITS reach out to the NSI Program

Management Office and review materials available on the NSI Web site available at <http://nsi.ncirc.gov>.

BITS Comment: BITS values the Department's commitment and efforts to improve information-sharing of security threats between the public and private sector. As partners with law enforcement, we have a long history of positive collaboration with law enforcement officials in the areas of cybersecurity, fraud, and money laundering. The financial services industry has a vested interest in protecting the financial system from illicit activities that could harm national security. As such, we are interested in the Department's plan to make the ISE-SARs available to "federal departments and agencies, state, local, and tribal law enforcement agencies, and the private sector." We hope the Department will provide additional information about: (1) the identities of the as-yet unnamed "private sector" partners or industries who would have access to ISE-SARs; and (2) private-sector and public law-enforcement credentialing requirements.

Response: DHS would like to clarify that DHS's contribution of ISE-SARs to the NSI Shared Space will make this information available only to *authorized* NSI participants. DHS does not maintain a list of private sector partners or entities who are authorized NSI participants. As previously noted, the NSI is not just a DHS initiative; it is overseen by the Department of Justice and authorized participants may include federal departments, state, local, and tribal law enforcement agencies, and the private sector. Accordingly, DHS recommends that BITS reach out to the Department of Justice NSI PMO regarding information on private sector industries who would have access to the NSI Shared Space as well as any requirements for becoming an authorized participant. Information about NSI partners is available at the NSI Web site at <https://nsi.ncirc.gov>.

BITS Comment: We applaud the Department's promulgation of an explicit exemption from certain parts of the Freedom of Information Act (FOIA) for the ISE-SARs program, although we encourage the Department to revisit the strength and application of the exemption, particularly if the Department plans to collect cybersecurity information from private entities regarding cyber attacks.

Because of the sensitivity and potential for severe damage associated with reported cyber attacks and vulnerabilities, we hope the Department will provide a blanket exemption from FOIA for ISE-SARs filed by a private-sector entity reporting an information-

security related attack. A blanket FOIA exemption would further the Department's goals of information-sharing because it would increase the likelihood that institutions would voluntarily report suspected or confirmed cyber attacks that are not required to be reported. In the past, institutions have been reluctant to share information regarding suspected cyber attacks because of the potential for endangering their customers and their institutions. The creation of a standard, blanket exemption for the identifying information of the reporting entity would eliminate the reticence in the private sector and support more robust participation levels.

Response: DHS would like to clarify that the NPRM is exempting the DHS/ALL-031 ISE-SAR Initiative System of Records from certain portions of the Privacy Act, not the FOIA, as commenter suggests. When DHS processing either a Privacy Act or FOIA request, both applicable Privacy Act and appropriate FOIA exemptions are applied. With respect to applying FOIA exemptions, DHS applies FOIA exemptions available under current law. The FOIA currently does not provide for a standard "blanket exception" for ISE-SARs data filed by a private-sector entity reporting an information-security related attack. Nevertheless, if DHS were to receive a FOIA request for such information, it would apply applicable FOIA exemptions (e.g., Exemption 4 which applies to trade secrets and commercial or financial information obtained from a person that is privileged or confidential may apply in this instance).

BITS Comment: Given the likelihood that BSA-related ISE-SARs may be aggregated into the ISE-SAR central data warehouse, we urge the Department to consider providing a dual "safe-harbor" provision to protect private-sector, regulated entities that submit reports to the ISE-SAR database.

First, a safe harbor should be created to address the liabilities associated with the provision of personally identifiable information to the ISE. We understand that the Department will exercise the utmost caution to protect the integrity of PII, but we also recognize that the provision of PII in such a large scale to federal agencies or private entities inevitably raises the specter of data compromise, identity theft, and fraud. Thus, we respectfully request that entities providing such PII in the requisite format be shielded from civil and criminal liability arising from the provision of PII to the ISE-SAR database.

We also suggest the creation of a "safe harbor" to protect prudentially regulated, private-sector entities (such as financial institutions) who: (1) Are compliant with relevant federal regulations; and (2) submit data to the ISE-SAR database in good faith, from adverse regulatory findings based on conclusions resulting from governmental use of the ISE-SAR database.

Response: DHS is one of many authorized NSI participants and therefore cannot comment on whether a "large scale of BSA-related ISE-SARs" will be included in the NSI Shared Space. To the extent DHS enters in ISE-SAR data obtained from an external entity into the NSI Shared Space, it will entail the use of the Summary ISE-SAR Information format, which excludes privacy fields or data elements that contain PII as identified in Section IV of the ISE-SAR Functional Standard. It is believed the data contained within a Summary ISE-SAR Information format will support sufficient trending and pattern recognition to trigger further analysis and/or investigation where additional information can be requested from the submitting organization. Accordingly, DHS does not see the need to create a "dual safe harbor provision" as the commenter suggests.

After consideration of public comments, the Department will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information, Privacy.

■ For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for part 5 continues to read as follows:

Authority: 6 U.S.C. 101 *et seq.*; Pub. L. 107-296, 116 Stat. 2135; 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Add at the end of appendix C to part 5, the following new paragraph "52":

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

52. The DHS/ALL-031 ISE SAR Initiative System of Records consists of electronic records and will be used by DHS and its components. The DHS/ALL-031 ISE SAR Initiative System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under;

national security and intelligence activities; and protection of the President of the U.S. or other individuals pursuant to Section 3056 and 3056A of Title 18. The DHS/ALL—031 ISE SAR Initiative System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS, its components, as well as other federal, state, local, tribal, or foreign agencies or private sector organization and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies. The Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitations set forth in 5 U.S.C. 552a(c)(3) and (4); (d); (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), and (e)(12); (f); (g)(1); and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). Additionally, the Secretary of Homeland Security has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2) and (k)(3). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) and (c)(4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced

occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(e) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(f) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(g) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(h) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(i) From subsection (e)(12) (Computer Matching) if the agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the **Federal Register** notice of such establishment or revision.

(j) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(k) From subsection (h) (Legal Guardians) the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

Dated: December 9, 2010.

Mary Ellen Callahan

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2010-32000 Filed 12-20-10; 8:45 am]

BILLING CODE 9110-9B-P

DEPARTMENT OF AGRICULTURE

Office of the Secretary

7 CFR Part 2

RIN 0503-AA43

Revision of Delegation of Authority

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This document amends the delegation of authority from the U.S. Department of Agriculture's Under Secretary for Marketing and Regulatory Programs (MRP) to the Deputy Under Secretary for MRP to establish the order in which a Deputy Under Secretary may perform the duties and exercise the powers of the Under Secretary during the absence or unavailability of the Under Secretary when there is more than one Deputy Under Secretary.

DATES: *Effective Date:* December 21, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Grillo, Chief of Staff, Marketing and Regulatory Programs, USDA, 1400 Independence Avenue, SW., Washington, DC 20250; 202-7204-256.

SUPPLEMENTARY INFORMATION: Pursuant to 7 CFR 2.77, the Under Secretary for Marketing and Regulatory Programs (MRP) has delegated to the Deputy Under Secretary for MRP the following authority, to be exercised only during the absence or unavailability of the Under Secretary: Perform all the duties and exercise all the powers which are now or which may hereafter be delegated to the Under Secretary. This final rule amends 7 CFR 2.77 to establish the order in which a Deputy Under Secretary may exercise that delegation when the MRP mission area has more than one Deputy Under Secretary. The authority shall be exercised by the respective Deputy Under Secretary in the order in which he or she has taken office as the Deputy Under Secretary.

This rule relates to internal agency management. Therefore, this rule is exempt from the provisions of Executive Orders 12866 and 12988. Moreover, pursuant to 5 U.S.C. 553, notice of proposed rulemaking and opportunity for comment are not required for this rule, and it may be made effective less

than 30 days after publication in the **Federal Register**. In addition, under 5 U.S.C. 804, this rule is not subject to congressional review under the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121. Finally, this action is not a rule as defined by 5 U.S.C. 601 *et seq.*, the Regulatory Flexibility Act, and thus is exempt from the provisions of that Act.

List of Subjects in 7 CFR Part 2

Authority delegations (Government agencies).

■ Accordingly, 7 CFR part 2 is amended as follows:

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

■ 1. The authority for part 2 continues to read as follows:

Authority: 7 U.S.C. 6912(a)(1); 5 U.S.C. 301; Reorganization Plan No. 2 of 1953, 3 CFR 1949–1953 Comp., p. 1024.

Subpart N—Delegations of Authority by the Under Secretary for Marketing and Regulatory Programs

■ 2. Section 2.77 is revised to read as follows:

§ 2.77 Deputy Under Secretary for Marketing and Regulatory Programs.

Pursuant to § 2.22(a), subject to reservations in § 2.22(b), and subject to policy guidance and direction by the Under Secretary, the following delegation of authority is made by the Under Secretary for Marketing and Regulatory Programs to the Deputy Under Secretary for Marketing and Regulatory Programs, to be exercised only during the absence or unavailability of the Under Secretary: Perform all the duties and exercise all the powers which are now or which may hereafter be delegated to the Under Secretary for Marketing and Regulatory Programs: Provided, that this authority shall be exercised by the respective Deputy Under Secretary in the order in which he or she has taken office as a Deputy Under Secretary.

Dated: December 2, 2010.

Edward Avalos,

Under Secretary, Marketing and Regulatory Programs.

[FR Doc. 2010–31942 Filed 12–20–10; 8:45 am]

BILLING CODE 3410–90–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1253; Directorate Identifier 2010–SW–084–AD; Amendment 39–16550; AD 2010–26–11]

RIN 2120–AA64

Airworthiness Directives; Kaman Aerospace Corporation (Kaman) Model K–1200 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the Kaman Model K–1200 helicopters. This AD requires revising the Limitations section of the Instructions for Continued Airworthiness (ICA) by establishing a life limit of 8,000 hours time-in-service (TIS) for each main rotor blade (blade) set. Also, this AD requires removing each blade set from service if it has accumulated 8,000 or more hours time-in-service (TIS). This AD also requires replacing certain blade sets with airworthy blade sets at specified intervals based on the blade set serial number (S/N). This AD was prompted by an accident and the subsequent discovery of cracks in multiple blade spars. We are issuing this AD to prevent blade failure and subsequent loss of control of the helicopter.

DATES: This AD is effective on January 5, 2011.

We must receive comments on this AD by February 22, 2011.

ADDRESSES: You may send comments by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Fax:** 202–493–2251.

- **Mail:** U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Kaman Aerospace Corporation, K-max Product Support Center, Building 33, P.O. Box 2, 1332 Blue Hills Avenue, Bloomfield, CT 06002, telephone (860) 242–4461.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone: 800–647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt. You may review copies of the referenced service information at the FAA, Rotorcraft Directorate, 2601 Meacham Boulevard, Fort Worth, TX 76137.

FOR FURTHER INFORMATION CONTACT:

Nicholas Faust, Aerospace Engineer, Boston Aircraft Certification Office, FAA, 12 New England Executive Park; telephone: (781) 238–7763; fax: (781) 238–7170; e-mail: nicholas.faust@faa.gov.

SUPPLEMENTARY INFORMATION:

Discussion

We are adopting a new AD for the Kaman Model K–1200 helicopters that requires revising the Airworthiness Limitations section of the ICA by establishing a life limit of 8,000 hours TIS for each blade set. Previously, these blades sets did not have an established retirement life but had specified overhaul intervals. This AD also requires removing each blade set with 8,000 or more hours TIS from service. Also, this AD requires replacing certain blade sets with airworthy blade sets at specified intervals based on the blade set S/N. This AD was prompted by an accident and the subsequent discovery of cracks in multiple blade spars. This condition, if not corrected, could result in a cracked spar, failure of a blade, and subsequent loss of control of the helicopter.

Relevant Service Information

We reviewed Kaman Service Bulletin No. 131, Rotor Blade Service Life Reduction, dated August 11, 2010 (SB). The SB specifies establishing “a service life of K–1200 rotor blade spar bondment (K911004) to 8,000 hours time since new (TSN)” and removing all blade sets with over 8,000 hours TIS.

FAA’s Determination

We are issuing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other helicopters of this same type design.

AD Requirements

This AD requires, before further flight, revising the Airworthiness Limitations section of the ICA by establishing a life limit of 8,000 hours TIS for each affected blade set. This AD requires replacing the specified blade sets with airworthy blade sets at various intervals depending on TIS. Based on the individualized data from those operators with the affected serial-numbered blade sets, those serial numbered blade sets with the highest hours TIS are required to be replaced sooner than those with less hours TIS.

Differences Between the AD and the Service Information

This AD requires, before further flight, revising the Airworthiness Limitations section of the ICA to establish a life limit of 8,000 hours TIS for each blade set. Also, this AD requires replacing certain blade sets with airworthy blade sets at specified intervals based on the blade S/N.

FAA's Justification and Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA finds that the risk to the flying public justifies waiving notice and comment prior to adopting this rule because cracks have been found in the blade spars during an investigation in response to an accident. Due to the number of hours TIS of the fleet, some of the blade sets may have exceeded 8,000 hours TIS and the blade sets may be required to be replaced before further flight. Therefore, we find that notice and opportunity for prior public comment are impracticable and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment. However, we invite you to send any written data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES**

section. Include the docket number FAA-2010-1253 and Directorate Identifier 2010-SW-084-AD at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Costs of Compliance

We estimate that this AD affects 14 helicopters of U.S. registry. The Kaman Model K-1200 helicopter is unique in that each helicopter has 2 sets of 2 blades, a total of 4 blades per helicopter. Some helicopters only require one set of blades to be replaced.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per helicopter	Cost on U.S. operators
Replace blade set (2 blades).	4 work-hours × \$85 per hour = \$340 per blade set.	\$198,751 per blade set	\$199,091 per blade set	\$1,393,637, assuming 7 blade sets are replaced.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs" describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701: "General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on helicopters identified in this rulemaking action.

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a

substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),
- (3) Will not affect intrastate aviation in Alaska, and
- (4) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

- Accordingly, under the authority delegated to me by the Administrator,

the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

- 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

- 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

2010-26-11 Kaman Aerospace

Corporation: Amendment 39-16550; Docket No. FAA-2010-1253; Directorate Identifier 2010-SW-084-AD.

Effective Date

- (a) This AD is effective on January 5, 2011.

Other Affected ADs

- (b) None.

Applicability

- (c) This AD applies to Model K-1200 helicopters.

Unsafe Condition

(d) This AD was prompted by an accident and the subsequent discovery of cracks in the main rotor blade (blade) spars. We are issuing this AD to prevent blade failure and subsequent loss of control of the helicopter.

Compliance

(e) Before further flight, unless already done:

(1) Revise the Limitations section of the Instructions for Continued Airworthiness by establishing a life limit of 8,000 hours time-in-service (TIS) for each blade set. Remove each blade set with 8,000 or more hours TIS.

(2) Replace each specified serial-numbered blade set with an airworthy blade set in accordance with the following table:

Blade-set Serial No.	Replace within
101, 403, 408, 409, 411, and 415.	400 hours TIS.
417 and 419	700 hours TIS.
405	1000 hours TIS.

Subject

(f) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code: 6210 Main Rotor Blades.

Alternative Methods of Compliance (AMOCs)

(g) The Manager, Boston Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested, using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the "Additional Information" section of this AD.

Note: Before using any approved AMOC, we request that you notify your principal inspector or if you have no principal inspector, your local Flight Standards District Office.

Additional Information

(h) For more information about this AD, contact Nicholas Faust, Aerospace Engineer, Boston Aircraft Certification Office, FAA, 12 New England Executive Park; telephone: 781-283-7763; fax: 781-238-7170; e-mail: nicholas.faust@faa.gov.

Issued in Fort Worth, Texas, on December 14, 2010.

Bruce Cain,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2010-31960 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2009-0864; Directorate Identifier 2008-NM-202-AD; Amendment 39-16544; AD 2010-26-05]

RIN 2120-AA64

Airworthiness Directives; DASSAULT AVIATION Model Falcon 10 Airplanes; Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G Airplanes; Model MYSTERE-FALCON 200 Airplanes; Model MYSTERE-FALCON 20-C5, 20-D5, 20-E5, and 20-F5 Airplanes; Model FALCON 2000 and FALCON 2000EX Airplanes; and Model MYSTERE-FALCON 50 and MYSTERE-FALCON 900 Airplanes, and FALCON 900EX Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

During maintenance on one aircraft, it was discovered that the overpressure capsules were broken on both pressurization valves. Failure of the pressurization control regulating valve (overpressure capsule) will affect the aircraft's overpressure protection * * *.

* * * * *

The unsafe condition is overpressurization, which can result in injury to the occupants and possible structural failure leading to loss of control of the airplane. We are issuing this AD to require actions to correct the unsafe condition on these products.

DATES: This AD becomes effective January 25, 2011.

ADDRESSES: You may examine the AD docket on the Internet at <http://www.regulations.gov> or in person at the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA,

1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1137; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION:**Discussion**

We issued a supplemental notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That supplemental NPRM was published in the **Federal Register** on July 27, 2010 (75 FR 43878). That supplemental NPRM proposed to correct an unsafe condition for the specified products. The MCAI states:

During maintenance on one aircraft, it was discovered that the overpressure capsules were broken on both pressurization valves. Failure of the pressurization control regulating valve (overpressure capsule) will affect the aircraft's overpressure protection, possibly resulting in a structural failure in case of combination with another pressurization system failure. Consequently, Dassault Aviation has developed a repetitive check of this outflow valve capsule, which has already been introduced into the Maintenance of Components section (chapter 5-20) of the relevant Aircraft Maintenance Manuals (AMMs).

For the reason described above, this EASA [European Aviation Safety Agency] Airworthiness Directive (AD) requires a repetitive check of the outflow valve overpressure capsule, as it will also be introduced into the Airworthiness Limitations section (chapter 5-40) of the respective AMMs.

The unsafe condition is overpressurization, which can result in injury to the occupants and possible structural failure leading to loss of control of the airplane. Required actions include repetitive inspections for overpressure tightness on both regulating valves, and replacing the affected valve with a serviceable unit if necessary. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comment received.

Request for Certain Airplanes To Be Included in the Time Extension

Dassault Aviation requested that we revise the supplemental NPRM to extend the time interval for Model Mystere-Falcon 50 airplanes, for the overpressure tightness check that was specified in the supplemental NPRM. The extension of the time interval specified in the supplemental NPRM was from 1,630 flight hours to 1,640 flight hours for other models.

We agree to extend the time interval for Model Mystere-Falcon 50 airplanes

in the final rule. The original NPRM defined a time interval for Model MYSTERE-FALCON 50, MYSTERE-FALCON 900, FALCON 900EX, FALCON 2000, and FALCON 2000EX airplanes. The supplemental NPRM extended the time interval for Model MYSTERE-FALCON 900, FALCON 900EX, FALCON 2000, and FALCON 2000EX airplanes. The extended interval for Model MYSTERE-FALCON 50 airplanes from 1,630 flight hours to 1,640 flight hours was coordinated with EASA. We have revised Table 1 of paragraph (g)(1) of the final rule accordingly.

Request for Inclusion of the Latest Procedure

Dassault Aviation requested that we revise the supplemental NPRM to refer to the most current version of Dassault Maintenance Procedure 21–160, of the Dassault Falcon 50/50EX Maintenance Manual. Dassault Aviation explains that the referenced maintenance procedure has been updated with a new picture and that the procedure is now dated January 2010.

We agree for the reasons stated by the commenter. We have revised Table 2 of the final rule to refer to Dassault Maintenance Procedure 21–160, dated January 2010, as a source of guidance on inspecting for overpress tightness on both valves for Model MYSTERE-FALCON 50 airplanes.

Conclusion

We reviewed the available data, including the comment received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We determined that these changes will not increase the economic burden on any operator or increase the scope of the AD.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow our FAA policies. Any such differences are highlighted in a Note within the AD.

Costs of Compliance

We estimate that this AD will affect 1,082 products of U.S. registry. We also estimate that it will take about 1 work-hour per product to comply with the basic requirements of this AD. The average labor rate is \$85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be \$91,970, or \$85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket

contains the NPRM, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the ADDRESSES section. Comments will be available in the AD docket shortly after receipt.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2010–26–05 DASSAULT AVIATION:

Amendment 39–16544. Docket No. FAA–2009–0864; Directorate Identifier 2008–NM–202–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective January 25, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) DASSAULT AVIATION Model Falcon 10 airplanes, Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes, and Model MYSTERE-FALCON 20–C5, 20–D5, 20–E5, and 20–F5 airplanes; all serial numbers, equipped with Liebherr or ABG-Semca pressurization outflow valves.

(2) DASSAULT AVIATION Model MYSTERE-FALCON 200 airplanes, Model MYSTERE-FALCON 50 and MYSTERE-FALCON 900, and FALCON 900EX airplanes, and Model FALCON 2000 and FALCON 2000EX airplanes; all serial numbers.

Subject

(d) Air Transport Association (ATA) of America Code 21: Air Conditioning.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

During maintenance on one aircraft, it was discovered that the overpressure capsules were broken on both pressurization valves. Failure of the pressurization control regulating valve (overpressure capsule) will affect the aircraft's overpressure protection

* * *

The unsafe condition is overpressurization, which can result in injury to the occupants and possible structural failure leading to loss of control of the airplane.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Inspection and Replacement

(g) Unless already done, do the following actions.

(1) Within 6 months after the effective date of this AD, or before reaching the applicable time in the “Inspection Threshold” column specified in Table 1 of this AD, whichever occurs later, and thereafter at intervals not to exceed the applicable time in the “Inspection

Interval” column specified in Table 1 of this AD: Inspect for overpressure tightness on both regulating valves using a method approved by either the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the European Aviation Safety Agency (EASA) (or its delegated agent).

TABLE 1—COMPLIANCE TIMES

Affected airplanes	Inspection threshold (whichever occurs later)		Inspection interval
Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes, and Model MYSTERE-FALCON 20-C5, 20-D5, 20-E5, and 20-F5 airplanes equipped with Liebherr or ABG-Semca valves part number (P/N) 209xx0xxx0x;	Prior to the accumulation of 1,250 total flight hours on the regulating valve since new.	Within 1,250 flight hours after the valve was cleaned in accordance with this AD.	1,250 flight hours.
Model MYSTERE-FALCON 200 airplanes; Model Falcon 10 airplanes, equipped with Liebherr or ABG-Semca valves P/N 209xx0xxx0x.			
Model MYSTERE-FALCON 50 airplanes, Model MYSTERE-FALCON 900, FALCON 900EX (including “F900EX-EASy” and “F900DX”), Model FALCON 2000, and FALCON 2000EX (including “F2000EX-EASy” and “F2000DX”) airplanes.	Prior to the accumulation of 1,640 total flight hours on the regulating valve since new.	Within 1,640 flight hours after the valve was cleaned in accordance with this AD.	1,640 flight hours.

Note 1: Guidance on inspecting for overpressure tightness on both regulating valves can be found in the applicable

airplane maintenance manual identified in Table 2 of this AD.

TABLE 2—MAINTENANCE MANUAL GUIDANCE

For affected airplanes—	See Dassault maintenance procedure—	In maintenance manual—
Model Falcon 10 airplanes, equipped with Liebherr or ABG-Semca valves P/N 209xx0xxx0x.	21-32-01, dated July 2009	Dassault Falcon 10 Maintenance Manual.
Model FALCON 900EX (including “F900EX-EASy” and “F900DX”) airplanes.	21-314, dated September 2008	Dassault Falcon 900EX-EASy Maintenance Manual.
Model FALCON 2000 and FALCON 2000EX (including “F2000EX-EASy”) airplanes.	21-314, dated November 2008	Dassault Falcon 2000 Maintenance Manual.
Model FALCON F2000DX airplanes	21-314, dated November 2008	Dassault Falcon 2000DX Maintenance Manual.
Model FAN JET FALCON, FAN JET FALCON SERIES C, D, E, F, and G airplanes, MYSTERE-FALCON 20-C5, 20-D5, 20-E5, and 20-F5 airplanes; equipped with Liebherr or ABG-Semca valves part number (P/N) 209xx0xxx0x.	21-31-10, dated October 2008	Dassault Fan Jet Falcon Maintenance Manual.
Model MYSTERE-FALCON 50 airplanes	21-160, dated January 2010	Dassault Falcon 50/50EX Maintenance Manual.
Model MYSTERE-FALCON 200 airplanes	051.0, dated December 2008	Dassault Falcon 200 Maintenance Manual.
Model MYSTERE-FALCON 900 airplanes	21-308, dated October 2008	Dassault Falcon 900 Maintenance Manual.

(2) If any leak is found during any inspection required by paragraph (g)(1) of this AD, before further flight, replace the affected valve with a serviceable unit, using a method approved by either the Manager, International Branch, ANM-116, Transport Airplane Directorate, FAA; or the EASA (or its delegated agent).

Note 2: Guidance on replacing regulating valves can be found in the applicable airplane maintenance manual identified in Table 2 of this AD.

FAA AD Differences

Note 3: This AD differs from the MCAI as follows: Although paragraph (3) of the compliance section of the MCAI allows flight in accordance with the master minimum equipment list (M MEL) provisions after leaks are found, paragraph (g)(2) of this AD requires replacing affected valves before further flight.

Other FAA AD Provisions

(h) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International

Branch, ANM-116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Rodriguez, Aerospace Engineer, International Branch, ANM-116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057-3356; telephone (425) 227-1137; fax (425) 227-1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office.

The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product*: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements*: A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, *Attn*: Information Collection Clearance Officer, AES-200.

Related Information

(i) Refer to MCAI EASA Airworthiness Directive 2008-0072, dated April 18, 2008, for related information.

Material Incorporated by Reference

(j) None.

Issued in Renton, Washington, on December 10, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010-31896 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 510

[Docket No. FDA-2010-N-0002]

New Animal Drugs; Change of Sponsor's Address

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect a change of address for Intervet, Inc., a sponsor of approved new animal drug applications.

DATES: This rule is effective December 21, 2010.

FOR FURTHER INFORMATION CONTACT: Steven D. Vaughn, Center for Veterinary Medicine (HFV-100), Food and Drug Administration, 7520 Standish Pl., Rockville, MD 20855, 240-276-8300, e-mail: steven.vaughn@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: Intervet, Inc., 56 Livingston Ave., Roseland, NJ 07068 has informed FDA that it has

changed its address to 556 Morris Ave., Summit, NJ 07901. Accordingly, the Agency is amending the regulations in 21 CFR 510.600 to reflect this change.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801-808.

List of Subjects in 21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR part 510 is amended as follows:

PART 510—NEW ANIMAL DRUGS

■ 1. The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

■ 2. In § 510.600, in the table in paragraph (c)(1), revise the entry for "Intervet, Inc."; and in the table in paragraph (c)(2), revise the entry for "000061" to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

*	*	*	*	*
(c)	*	*	*	*
(1)	*	*	*	*

Firm name and address				Drug labeler code		
*	*	*	*	*	*	*
Intervet, Inc., 556 Morris Ave., Summit, NJ 07901				000061		
*	*	*	*	*	*	*
(2) * * *						
Drug labeler code				Firm name and address		
*	*	*	*	*	*	*
000061				Intervet, Inc., 556 Morris Ave., Summit, NJ 07901.		
*	*	*	*	*	*	*

Dated: December 9, 2010.

Steven D. Vaughn,

*Director, Office of New Animal Drug
Evaluation, Center for Veterinary Medicine.*

[FR Doc. 2010-31952 Filed 12-20-10; 8:45 am]

BILLING CODE 4160-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 53

[USCG-2009-0239]

RIN 1625-AB33

Protection for Whistleblowers in the Coast Guard

AGENCY: Coast Guard, DHS.

ACTION: Direct final rule; request for
comments.

SUMMARY: By this direct final rule, the Coast Guard is amending its “Coast Guard Whistleblower Protection” regulations to conform to statutory protections for all members of the Armed Forces. The revised regulations broaden the protection already afforded uniformed members of the Coast Guard by: Providing that uniformed Coast Guard members may make protected communications to other persons and organizations in addition to Members of Congress or an Inspector General, and expanding the subject matter of protected communications to include information that the member reasonably believes constitutes evidence of sexual harassment and discrimination, among other subjects. Additionally, changes to the regulations update the responsibilities of the Inspector General of the Department of Homeland Security to conform to relevant statutory provisions.

DATES: This rule is effective April 20, 2011, unless an adverse comment or notice of intent to submit an adverse comment is either submitted to our online docket via <http://www.regulations.gov> on or before February 22, 2011, or reaches the Docket Management Facility by that date. If an adverse comment or notice of intent to submit an adverse comment is received by February 22, 2011, we will withdraw this direct final rule and publish a timely notice of withdrawal in the **Federal Register**.

ADDRESSES: You may submit comments identified by docket number USCG-2009-0239 using any one of the following methods:

(1) Federal eRulemaking Portal:
<http://www.regulations.gov>.

(2) Fax: 202-493-2251.

(3) Mail: Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590-0001.

(4) Hand delivery: Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, e-mail or call Commander Michael Cavallaro, U.S. Coast Guard Office of General Law, telephone 202-372-3777, e-mail Michael.S.Cavallaro@uscg.mil. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

SUPPLEMENTARY INFORMATION:

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I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to <http://www.regulations.gov> and will include any personal information you have provided.

A. Submitting Comments

If you submit comments, please include the docket number for this rulemaking (USCG-2009-0239),

indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online, or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, and type “USCG-2009-0239” in the “Keyword” box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>, click on the “read comments” box, which will then become highlighted in blue. In the “Keyword” box type “USCG-2009-0239” and click “Search.” Click the “Open Docket Folder” in the “Actions” column. If you do not have access to the internet, you may also view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

D. Public Meeting

We do not now plan to hold a public meeting for this rulemaking. But you may submit a request for one to the docket using one of the methods specified under **ADDRESSES**. In your

request, explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

II. Abbreviations

DHS Department of Homeland Security
NEPA National Environmental Policy Act of 1969
NPRM Notice of Proposed Rulemaking
NTTAA National Technology Transfer and Advancement Act

III. Regulatory Information

We are publishing this direct final rule under 33 CFR 1.05–55 because we consider this rule to be noncontroversial and we do not expect adverse comments regarding this rulemaking. If no adverse comment or notice of intent to submit an adverse comment is received by February 22, 2011, this rule will become effective as stated in the **DATES** section. In that case, approximately 30 days before the effective date, we will publish a document in the **Federal Register** stating that no adverse comment was received and confirming that this rule will become effective as scheduled. However, if we receive an adverse comment or notice of intent to submit an adverse comment, we will publish a notice in the **Federal Register** announcing the withdrawal of all or part of this direct final rule. If an adverse comment applies only to part of this rule (*e.g.*, to an amendment, a paragraph, or a section) and it is possible to remove that part without defeating the purpose of this rule, we may adopt, as final, those parts of this rule on which no adverse comment was received. We will withdraw the part of this rule that was the subject of an adverse comment. If we decide to proceed with a rulemaking following receipt of an adverse comment, we will publish a separate notice of proposed rulemaking (NPRM) and provide a new opportunity for comment.

A comment is considered “adverse” if the comment explains why this rule or a part of this rule would be inappropriate, including a challenge to its underlying premise or approach, or would be ineffective or unacceptable without a change.

IV. Background

Section 1034 of Title 10 of the United States Code protects communications made by members of the Armed Forces to Members of Congress, Inspectors General, and certain other persons and organizations. It prohibits any person from taking, withholding, or threatening any personnel action against a member

of the Armed Forces as reprisal for making or preparing any protected communications. Uniformed members of the Coast Guard are members of the Armed Forces and are covered by section 1034. *See* 10 U.S.C. 101(a)(4) (defining “Armed Forces” to mean “the Army, Navy, Air Force, Marine Corps, and Coast Guard”). Section 1034 covers allegations and disclosures of sexual harassment and unlawful discrimination, and gives specific procedural rights to a complainant alleging reprisal for making a protected communication. Amending 33 CFR part 53 is necessary to conform Coast Guard regulations to 10 U.S.C. 1034.

V. Discussion of the Rule

The Coast Guard is amending paragraph (a) of section 53.1, Purpose, to expand the list of organizations and persons to whom protected communications may be made. The existing language limits protection to communications made to a Member of Congress or an Inspector General. Under amended paragraph (a), protected communications may also be made to “a member of a Department of Defense or Department of Homeland Security audit, inspection, investigation, or law enforcement organization (*e.g.*, the Coast Guard Investigative Service); any person or organization in the chain of command; and any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.” Through this amendment to paragraph (a), the Coast Guard is designating the Coast Guard Investigative Service as an organization to which a uniformed member of the Coast Guard may make a protected communication. The Coast Guard Investigative Service is a Federal investigative and protective program established to carry out the Coast Guard’s internal and external criminal investigations; to assist in providing personal security services; to protect the welfare of Coast Guard personnel; to aid in preserving the internal integrity of the Coast Guard; and to support Coast Guard missions worldwide.

The Coast Guard is amending section 53.5 to revise and add several definitions, including adding a definition of “Protected Communication,” which defines the communications covered by 33 CFR part 53. A “Protected Communication” is (1) any lawful communication to a Member of Congress or an Inspector General; or (2) a communication in which a member of the Coast Guard communicates information that the member reasonably believes evidences a violation of law or

regulation (including sexual harassment or unlawful discrimination), gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to any of the following: A Member of Congress, an Inspector General, or a member of a Department of Defense or Department of Homeland Security audit, inspection, investigation, or law enforcement organization (*e.g.*, the Coast Guard Investigative Service); any person or organization in the chain of command; and any other person or organization designated pursuant to regulations or other established administrative procedures to receive such communications. The Coast Guard is also adding a definition for “Chain of Command,” which tracks a similar definition used by the Department of Defense in implementing 10 U.S.C. 1034.¹

The definition for “Inspector General” is revised to include any other Inspector General appointed under the Inspector General Act of 1978, in addition to the Inspector General in the Office of the Inspector General of the Department of Homeland Security. The revised definition of “Reprisal” now uses the defined term “protected communications.” The Coast Guard is also removing the definition of “Law Specialist” and replacing it with a definition for “Judge Advocate,” which reflects a nomenclature change within the Coast Guard legal program. A similar nomenclature change is made in section 53.9(c)(2): the parenthetical phrase “(who may also be serving as the Judge Advocate General of the Coast Guard)” is added after the term “Chief Counsel.”

The Coast Guard is amending 33 CFR part 53 to utilize these new and revised definitions and to make conforming changes throughout part 53. Sections 53.7 and 53.11 are amended to incorporate the new and revised definitions, and section 53.11 is revised to update the contact information for the DHS Office of the Inspector General. Sections 53.9 and 53.11 are amended to ensure that part 53 consistently covers allegations of personnel action that was taken, withheld, or threatened in reprisal by making consistent use of the terms “taken, withheld, or threatened.” Section 53.9 is also amended to consistently indicate that the “Secretary” referred to is the “Secretary of the Department of Homeland Security.” Finally, section 53.11(b) is

¹ *See* Department of Defense Directive 7050.06, “Military Whistleblower Protection,” Enclosure 2, section E2.3 (July 23, 2007).

amended by adding the words “name(s) of the” before the words “individual(s) believed to be responsible” to clarify what information is required to be included in the complaint to identify the individual or individuals believed to be responsible for the alleged reprisal.

In 33 CFR 53.9, the Coast Guard is revising slightly the responsibilities of the Inspector General to conform to those responsibilities as set forth in 10 U.S.C. 1034. In paragraphs (a)(1) and (2), the Inspector General now must determine whether there is sufficient evidence to warrant an investigation before initiating an investigation of the alleged reprisal. *See* 10 U.S.C. 1034(c)(3)(A). Such an investigation is necessary only if there was no prior investigation or if the prior investigation was biased or inadequate. *See* 10 U.S.C. 1034(d). In paragraph (a)(2), the word “reasonably” is inserted to show that information that a Coast Guard member presents as evidence of a reprisal need only be information that the member “reasonably believes” evidences wrongdoing. *See* 10 U.S.C. 1034(c)(2). Additionally, the last sentence of paragraph (a)(2), which states “The Inspector General is not required to make such an investigation if the information that the Coast Guard member reasonably believes evidences wrongdoing relates to actions that took place during combat,” is removed because similar language was removed from section 1034. *See* Pub. L. 103–337, 531(c)(2) (replacing 10 U.S.C. 1043(c)(4)).

The time period in which the Inspector General must complete the investigation is revised from “90 days” to “180 days” in 33 CFR 53.9(a)(3) and (a)(5) to align with the statute’s requirements. *See* 10 U.S.C. 1034(e)(3). The Coast Guard is also eliminating the requirement of a final interview of the member alleging reprisal by removing paragraph (a)(7) because a similar requirement was removed from 10 U.S.C. 1034.

Additionally, in section 53.9, the following text is being added to paragraph (a)(4) to clarify what information will be made available to an individual pursuant to a Freedom of Information Act request: “However, the copy need not contain summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is

transmitted to the member.” *See* 10 U.S.C. 1034(e)(2).

VI. Regulatory Analysis

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analysis based on 12 of these statutes or executive orders.

A. Regulatory Planning and Review

This rule is a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget has reviewed it under that Order. It requires an assessment of potential costs and benefits under section 6(a)(3) of that Order. However, we believe that a full regulatory analysis is unnecessary because this rule only affects uniformed members of the Coast Guard and DHS personnel and has no economic impact on U.S. industry or the general public.

This rule will benefit the Coast Guard. Because the rule provides protection for uniformed Coast Guard members from retaliation by supervisors or any other member of the Coast Guard, the Coast Guard may now receive information from Coast Guard members on potential breaches of government policies and regulations that they would not otherwise have received. This will ensure that uniformed Coast Guard members receive the same protections Congress affords other uniformed members of the Armed Forces.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This rule provides protection for uniformed Coast Guard members from retaliation and addresses responsibilities of the DHS Inspector General. Because this rule only affects uniformed Coast Guard members and DHS personnel, it is unlikely to have any effect on small businesses.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

C. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Although this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

G. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

H. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and will not create an environmental risk to health or risk to safety that might disproportionately affect children.

I. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and

responsibilities between the Federal Government and Indian tribes.

J. Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a “significant energy action” under that order. Although it is a “significant regulatory action” under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

K. Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

L. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01 and Commandant Instruction M16475.ID, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded under section 2.B.2, Figure 2–1, paragraph 34(b), of the Instruction. Paragraph 34(b) covers promulgation of regulations concerning internal agency function or organization or personnel administration. This rule only affects uniformed Coast Guard members and DHS personnel and provides protection from retaliation, and as such concerns

internal agency operations. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under the “Public Participation and Request for Comments” section of this preamble.

List of Subjects in 33 CFR Part 53

Administrative practice and procedure, Investigations, Military personnel, Whistleblowing.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 53 as follows:

PART 53—COAST GUARD WHISTLEBLOWER PROTECTION

■ 1. The authority citation for part 53 continues to read as follows:

Authority: 10 U.S.C. 1034, Pub. L. 100–456, 102 Stat. 1918; Pub. L. 101–225, 103 Stat. 1908; Pub. L. 107–296, 116 Stat. 2135.

■ 2. In § 53.1, revise paragraph (a) to read as follows:

§ 53.1 Purpose.

(a) Establishes policy and implements section 1034 of title 10 of the United States Code to provide protection against reprisal to members of the Coast Guard for making a protected communication to a Member of Congress; an Inspector General; a member of a Department of Defense or Department of Homeland Security audit, inspection, investigation, or law enforcement organization (e.g., the Coast Guard Investigative Service); any person or organization in the chain of command; and any other person or organization designated pursuant to regulations or other established administrative procedures for such communications.

■ 3. Amend § 53.5 as follows:

■ a. Remove the definition for “Law Specialist”; and

■ b. Revise the definitions for “Inspector General” and “Reprisal” and add the definitions for “Chain of Command”, “Judge Advocate”, and “Protected Communications” in alphabetical order to read as follows:

§ 53.5 Definitions.

Chain of Command. The succession of commanding officers from a superior to a subordinate through which command is exercised; and the succession of officers, enlisted members, or civilian personnel through whom administrative control is

exercised, including supervision and rating of performance.

* * * * *

Inspector General. The Inspector General in the Office of Inspector General of the Department of Homeland Security, or any other Inspector General, as appointed under the Inspector General Act of 1978.

Judge Advocate. A commissioned officer of the Coast Guard designated for the special duty of law.

* * * * *

Protected Communication. Any lawful communication to a Member of Congress or an Inspector General; or a communication in which a member of the Coast Guard communicates information that the member reasonably believes evidences a violation of law or regulation (including sexual harassment or discrimination), gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to any of the following: A Member of Congress; an Inspector General; a member of a Department of Defense or Department of Homeland Security audit, inspection, investigation, or law enforcement organization (e.g., the Coast Guard Investigative Service); any person or organization in the chain of command; and any other person or organization designated pursuant to regulations or other established administrative procedures to receive such communications.

Reprisal. Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, against a member of the Coast Guard for making or preparing to make a protected communication.

* * * * *

■ 4. In § 53.7, revise paragraphs (b) and (c) to read as follows:

§ 53.7 Requirements.

* * * * *

(b) A member of the Coast Guard shall be free from reprisal for making or preparing to make a protected communication.

(c) Any employee or member of the Coast Guard who has the authority to take, direct others to take, or recommend or approve any personnel action shall not, under such authority, take, withhold, threaten to take, or threaten to withhold a personnel action regarding any member of the Coast Guard in reprisal for making or preparing to make a protected communication.

■ 5. Amend § 53.9 as follows:

- a. Remove paragraph (a)(7); and
- b. Revise paragraphs (a)(1) through (a)(5), (b)(1), (c) introductory text, (c)(1) and (2), (e), and (f) to read as follows:

§ 53.9 Responsibilities.

(a) * * *

(1) Expeditiously determine whether there is sufficient evidence to warrant an investigation of an allegation that a personnel action has been taken, withheld, or threatened in reprisal for making or preparing to make a protected communication. No investigation is required when such allegation is submitted more than 60 days after the Coast Guard member became aware of the personnel action that is the subject of the allegation.

(2) If such investigation is warranted, initiate a separate investigation of the information the Coast Guard member reasonably believes evidences wrongdoing if a prior investigation has not already been initiated, or if the prior investigation was biased or inadequate.

(3) Complete the investigation of the allegation of reprisal and issue a report not later than 180 days after receipt of the allegation, which shall include a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted. The Inspector General may forward a recommendation as to the disposition of the complaint.

(4) Submit a copy of the investigation report to the Secretary of the Department of Homeland Security and to the Coast Guard member making the allegation not later than 30 days after the completion of the investigation. In the copy of the report transmitted to the member, the Inspector General shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under 5 U.S.C. 552. However, the copy transmitted to the member need not contain summaries of interviews conducted, nor any document acquired, during the course of the investigation. Such items shall be transmitted to the member, if the member requests the items, with the copy of the report or after the transmittal to the member of the copy of the report, regardless of whether the request for those items is made before or after the copy of the report is transmitted to the member.

(5) If a determination is made that the report cannot be issued within 180 days

of receipt of the allegation, notify the Secretary and the Coast Guard member making the allegation of the reasons why the report will not be submitted within that time, and state when the report will be submitted.

* * * * *

(b) * * *

(1) Consider under 10 U.S.C. 1552 and 33 CFR part 52 an application for the correction of records made by a Coast Guard member who has filed a timely complaint with the Inspector General alleging that a personnel action was taken in reprisal for making or preparing to make a protected communication. This may include oral argument, examining and cross-examining witnesses, taking depositions, and conducting an evidentiary hearing at the Board's discretion.

* * * * *

(c) If the Board elects to hold an administrative hearing, the Coast Guard member may be represented by a Judge Advocate if:

(1) The Inspector General, in the report of the investigation, finds there is probable cause to believe that a personnel action was taken, withheld, or threatened in reprisal for the Coast Guard member making or preparing to make a protected communication;

(2) The Chief Counsel of the Coast Guard (who may also be serving as the Judge Advocate General of the Coast Guard) determines that the case is unusually complex or otherwise requires the assistance of a Judge Advocate to ensure proper presentation of the legal issues in the case; and

* * * * *

(e) If the Board determines that a personnel action was taken, withheld, or threatened as a reprisal for a Coast Guard member making or preparing to make a protected communication, the Board may forward its recommendation to the Secretary of the Department of Homeland Security for appropriate administrative or disciplinary action against the individual or individuals found to have taken, withheld, or threatened a personnel action as a reprisal, and direct any appropriate correction of the member's records.

(f) The Board shall notify the Inspector General of the Board's decision concerning an application for the correction of military records of a Coast Guard member who alleged reprisal for making or preparing to make a protected communication, and of any recommendation to the Secretary of the

Department of Homeland Security for appropriate administrative or disciplinary action against the individual or individuals found to have taken, withheld, or threatened a personnel action as a reprisal.

* * * * *

- 6. In § 53.11, revise paragraphs (a), (b), and (c) to read as follows:

§ 53.11 Procedures.

(a) Any member of the Coast Guard who reasonably believes a personnel action was taken, withheld, or threatened in reprisal for making or preparing to make a protected communication may file a complaint with the Department of Homeland Security Inspector General Hotline at 1-800-323-8603. Such a complaint may be filed: By letter addressed to the Department of Homeland Security, Office of Inspector General, Hotline, Washington, DC 20528; By faxing the complaint to 202-254-4292; or by e-mailing DHSOIGHOTLINE@dhs.gov.

(b) The complaint should include the name, address, and telephone number of the complainant; the name and location of the activity where the alleged violation occurred; the personnel action taken, withheld, or threatened that is alleged to be motivated by reprisal; the name(s) of the individual(s) believed to be responsible for the personnel action; the date when the alleged reprisal occurred; and any information that suggests or evidences a connection between the protected communication and reprisal. The complaint should also include a description of the protected communication, including a copy of any written communication and a brief summary of any oral communication showing the date of communication, the subject matter, and the name of the person or official to whom the communication was made.

(c) A member of the Coast Guard who alleges reprisal for making or preparing to make a protected communication may submit an application for the correction of military records to the Board, in accordance with regulations governing the Board. See 33 CFR part 52.

* * * * *

Dated: December 15, 2010.

Robert J. Papp, Jr.,

Admiral, U.S. Coast Guard Commandant.

[FR Doc. 2010-32017 Filed 12-20-10; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Parts 154 and 155****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 112**

[Docket No. USCG-2010-0592; EPA-HQ-OPA-2010-0559]

RIN 1625-AB49; 2050-AG63

Temporary Suspension of Certain Oil Spill Response Time Requirements To Support Deepwater Horizon Oil Spill of National Significance (SONS) Response

AGENCIES: Coast Guard, DHS, and Environmental Protection Agency.

ACTION: Notice of no further regulatory action and alternative arrangements.

SUMMARY: The Coast Guard and the Environmental Protection Agency (EPA) announce that we have considered the comments, materials, and evidence received in response to the joint emergency temporary interim rule issued on June 30, 2010, and do not intend to take further regulatory action regarding the rule. As such, the rule will expire as scheduled on December 31, 2010. The Coast Guard and EPA also provide notice of the alternative arrangements under the National Environmental Policy Act used for the joint emergency temporary interim rule.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of dockets USCG-2010-0592 and EPA-HQ-OPA-2010-0559 and are available online by going to <http://www.regulations.gov>, inserting USCG-2010-0592 or EPA-HQ-OPA-2010-0559 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; and EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20460, Public Reading Room, between 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the EPA Docket Center Public Reading Room is 202-566-1744, and the telephone number to make an

appointment to view the docket is 202-566-0276.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail:

Coast Guard: (Facilities) Mr. David Condino, Ports and Facilities Division, Coast Guard, telephone 202-372-1145, e-mail David.A.Condino@uscg.mil; (Vessels) LCDR Ryan Allain, Office of Vessel Activities, Coast Guard, telephone 202-372-1226, e-mail Ryan.D.Allain@uscg.mil. If you have questions on viewing the USCG-2010-0952 docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

EPA: Troy Swackhammer, U.S. Environmental Protection Agency, telephone 202-564-1966, e-mail swackhammer.j-troy@epa.gov.

SUPPLEMENTARY INFORMATION: On April 20, 2010, the Mobile Offshore Drilling Unit (MODU) "Deepwater Horizon" exploded and sank, causing an unprecedented discharge of crude oil into the Gulf of Mexico, which was thereafter declared a "Spill of National Significance" (SONS). On April 24, 2010, the Commandant of the Coast Guard designated a Federal On-Scene Coordinator (FOSC) to coordinate Federal and State responses to the oil spill.

On June 16, 2010, the FOSC for the Deepwater Horizon SONS determined, after consulting with appropriate Federal and State agencies, that an adequate number of available oil spill response resources could not be employed in a timely manner to recover the oil released from the Deepwater Horizon SONS. (Memorandum from Rear Admiral J.A. Watson, FOSC BP Deepwater Horizon Oil Spill, to National Incident Command (June 16, 2010), available in the docket for this rulemaking).

In response to the FOSC's determination, on June 30, 2010, the Coast Guard and EPA issued a joint emergency temporary interim rule permitting oil spill removal organizations (OSROs) and facilities and vessels with oil spill response resources to relocate those resources to the Gulf of Mexico Deepwater Horizon SONS at the FOSC's request. 75 FR 37712. The rule also confirmed that the FOSC for the Deepwater Horizon SONS requested that the Armed Forces relocate response resources, in particular those of the Navy, from their current locations within the continental United States to the Gulf of Mexico to aid in the response to the Deepwater Horizon SONS.

The Navy did relocate response resources to the Deepwater Horizon SONS. While many spare State and privately owned resources had already relocated to the Gulf of Mexico before publication of the rule, no State or private entity relocated response resources to the SONS under the provisions of the rule.

The Coast Guard and EPA also requested comments on the rule, and stated that we would consider those comments and any other materials or evidence received from the field on an ongoing basis every thirty days to determine if changes to the rule might be necessary. The comment period closed on August 16, 2010, with the Coast Guard and EPA receiving 27 comments. We discuss those comments below. Neither the Coast Guard nor EPA has received comments since the close of the comment period. Although the rule will expire as scheduled on December 31, 2010, Coast Guard and EPA will continue to consider any new or additional comments, material or evidence related to the provisions of the rule until that date. If we decide to make changes to the rule before its expiration, we will publish another joint notice, or other appropriate document, in the **Federal Register**.

For this emergency rulemaking, and in accordance with Council On Environmental Quality (CEQ) Regulations Implementing the Procedural Requirements of the National Environmental Policy Act (40 CFR parts 1500-1508) and the National Environmental Policy Act of 1969 (NEPA) (43 U.S.C. 4321-4370f), the Coast Guard, with the assistance of EPA, consulted with CEQ about alternative arrangements pursuant to 40 CFR 1506.11. The Coast Guard, with the assistance of EPA, continued to consult with CEQ as well as with the National Oceanic and Atmospheric Administration (NOAA) and other key authorities in order to determine appropriate environmental impact analysis. A discussion of these consultations and determinations is below in *B. Alternative Arrangements under NEPA*. As stated above and discussed in greater detail below, the rule will expire as scheduled on December 31, 2010, without changes.

A. Discussion of Comments

The Coast Guard and EPA received 8 letters containing 27 comments in response to the request for comments on the rule. Commenters included individuals; an organization that represents companies that own, operate or charter tankers, ships, and other merchant vessels engaged in domestic

and international trade; an organization representing State environmental and health agencies; and a trade association representing companies involved in all aspects of the oil and natural gas industry. We also received comments from the Makah Tribal Council (MTC), and joint comments from the Governor of Washington and the Governor of Oregon. The Coast Guard and EPA responded directly in writing to MTC and the Governors. Those comments and responses, together with all other public comments, are available in the docket for this rulemaking. Also in the docket is a summary of an in-person communication that occurred on July 1, 2010, between Coast Guard personnel and OSRO community representatives regarding the rule. The in-person communication touched on concerns and questions about the substance of the rule, as well as questions relating to implementation of the rule. These concerns and questions and Coast Guard responsive comments are included in the summary of the communication, and are covered in the discussion below.

Several of the comments expressed support for the Coast Guard and EPA efforts to respond to the Deepwater Horizon SONS, and we appreciate the statements of support. Several other comments provided opinions about the causes and effects of the oil spill. The Coast Guard and EPA appreciate these commenters' participation in this rulemaking, however, such comments are beyond the scope of this rulemaking and are not addressed in this document. The remaining comments addressed the rule and are discussed by topic below.

1. Plan Holder Liability

Commenters were concerned about plan holder liability for damages and penalties if a spill occurred in their original location after the plan holder already contractually released its spill response providers and equipment for use in the response to the Deepwater Horizon SONS. Commenters were also concerned about liability under State requirements as well as other penalties, such as natural resource damages, under other Federal and State law.

Response: The intent of the rule is to make available more response resources for use in responding to the Deepwater Horizon SONS by relieving certain Coast Guard and EPA regulatory requirements. Through this rule, the Coast Guard and EPA encouraged plan holders to relieve their contracted-OSROs of certain responsibilities in order for those OSROs to be available to aid in responding to the Deepwater Horizon SONS. The Coast Guard and EPA coordinated on the rule because

many oil spill response plans address both Coast Guard and EPA oil spill response requirements. The rule was not meant to address all sources of potential plan holder liability, including other Federal requirements or State requirements.

2. Oil Spill Response Resources Return Time

Several comments noted concerns about the return of assets to original locations. One comment expressed concern that the rule does not contain a timetable for returning assets used in response to the Deepwater Horizon SONS. Other comments noted the distances and travel time for response assets from the West Coast, especially for larger vessels, to deploy to the Gulf in response to the Deepwater Horizon SONS and to return to the assets' original locations if needed to respond to an oil spill in those locations.

Response: The rule does not address return times for assets relocated in support of the response to the Deepwater Horizon SONS, because under the rule such issues, including the relative environmental impacts and other risks and impacts of the FOSC requesting and accepting offers for specific response resources from locations outside the Gulf of Mexico, are coordinated at the local level with the cognizant Captains of the Port (COTPs), Regional Response Teams, and Area Committees.

Additionally, in the letter to the Governors of Washington and Oregon dated September 3, 2010, (available in the docket) the Coast Guard and EPA specifically stated: "Any decision to request or accept [deployment of equipment or personnel that would result in the loss of response capability below worst case and maximum most probable discharge response time requirements in the Pacific Northwest] will consider carefully the distances and travel time from the West Coast to the Gulf Coast spill."

3. Adequate Coverage in Regions Outside the Gulf of Mexico

Comments addressed concerns about whether the Average Most Probable Discharge and Small Discharge standards in the rule provided adequate coverage, especially for the West Coast and Pacific Northwest, as well as delays in an adequate number of response resources responding to any oil spill outside of the Gulf Region. One comment noted that almost all new response equipment manufactured/built during the Deepwater Horizon SONS will likely be purchased/deployed for response to the Deepwater Horizon

SONS, further lengthening the time to return other locations to full preparedness levels under current response plan standards.

Response: As discussed above, under the rule, any decisions about equipment and personnel deployment are coordinated at the local level with the cognizant COTPs, Regional Response Teams, and Area Committees. Additionally, the letter to the Governors of Washington and Oregon stated that Coast Guard and EPA will continue to work in close coordination with state and local governments, affected local industries, Regional Response Teams and Area Committees to maintain a level of equipment able to best protect all localities.

4. Regional Approach for Moving Response Assets

Two comments suggested that the Coast Guard and EPA develop a regional approach rather than one nationwide rule for moving response assets. The comments encouraged developing regional strategies to ensure sufficient coverage remains in those regions before moving oil spill response assets outside of those regions. Another comment specifically requested utilizing Regional Response Teams for such a regional approach.

Response: The Coast Guard and EPA agree that the decision to actually move response assets is best made at the local and regional level. In order to allow those local and regional decisions to be made, however, this nationwide rule is necessary to temporarily suspend certain regulatory response time requirements. As stated in the rule, the Coast Guard and EPA coordinate and consult with Regional Response Teams and Area Committees, which include State representatives, for such decisions. Additionally, in a letter to the Governors of Washington and Oregon, the Coast Guard and EPA specifically stated: "If there were to be a scenario in which more response resources were needed in the Gulf, we would work closely with [state and local governments and affected local industries] and the Regional Response Teams and Area Committees, to ensure that we do not deploy equipment or personnel that would result in the loss of response capability below worst case and maximum most probable discharge response time requirements in the Pacific Northwest."

5. Plan Holders Included in the Decision To Move Assets

At least one comment requested that plan holders be included in any discussion regarding movement of

response assets to the Gulf or any future Spill of National Significance.

Response: The rule only addresses relocating assets in response to the Deepwater Horizon SONS. The Coast Guard and EPA agree that plan holders should be included in discussions regarding movement of response assets in response to the Deepwater Horizon SONS. That is why, as stated in the rule, any such relocation of assets is done only through coordination with the cognizant COTPs and Regional Response Teams and Area Committees, which include oil spill response community and plan holder representatives.

6. State Consultation

One comment requested that Coast Guard and EPA formally consult with state environmental agencies prior to approving the deployment of additional equipment and personnel out of their region that would result in the loss of response capability below the federal Maximum Most Probable Discharge standards.

Response: As stated in the rule, States are involved in any decisions about equipment and personnel deployment. The Coast Guard and EPA stated that we coordinate and consult with Regional Response Teams and Area Committees, which include State representatives, for such decisions. Additionally, in the letter to the Governors of Washington and Oregon, the Coast Guard and EPA stated that we will continue to work in close coordination with state and local governments and affected local industries.

7. Other Federal Laws and State and Local Laws

Several comments noted that the rule addresses only Coast Guard and EPA requirements, but that plan holders are also covered by other Federal regulatory requirements as well as State and local laws. One comment suggested revising the rule to address other Federal requirements as well as State and local requirements. Another comment suggested creating a permanent rule to address all Federal and State response standards for use in such emergency situations. This comment suggested working with States and Congress for a legislatively established emergency procedure for such situations.

Response: The Coast Guard and EPA coordinated on the rule because many oil spill response plans address both Coast Guard and EPA oil spill response requirements. The rule was not meant to address all Federal requirements or State requirements. In the rule, we

specifically stated that States are authorized to establish oil spill response standards more stringent than Coast Guard and EPA, and Coast Guard and EPA coordinate and consult with State representatives, regarding implementation of the rule. The rule will expire on December 31, 2010. The Coast Guard and EPA are considering whether a permanent rule addressing this issue is necessary, but would initiate a separate rulemaking for any such permanent rule.

8. Tribal Implications

The MTC disagreed with the finding in the rule that the rule does not have tribal implications under EO 13175 because tribal marine resources could be significantly jeopardized by an uncontained oil spill due to the depletion of government and private oil spill response assets in this region.

Response: In a letter to the MTC dated August 24, 2010, (available in the docket), the Coast Guard reaffirmed its determination that the rule does not have any tribal implications because the rule does not require the movement of any oil spill response resources away from current locations. Additionally, the letter noted that the MTC has been appointed to the Northwest Area Committee and will be part of any decision on whether to relocate oil spill response resources away from that Committee's area. EPA has also reaffirmed, through a letter to the MTC dated October 25, 2010, its determination that the rule does not have any tribal implications because the rule does not require the movement of any oil spill response resources away from current locations.

9. Plan Holder Input Into the Rule

One commenter felt that plan holders did not have sufficient input into the development of the rule.

Response: The Coast Guard and EPA note that the rule was issued as an emergency rulemaking in response to the exigent circumstances presented by the Deepwater Horizon SONS. Plan holders were given an opportunity to comment on the rule during the comment period. All comments, materials and evidence received on the rule are discussed above in this section.

B. Alternative Arrangements Under NEPA

Coast Guard and DHS, with the assistance of EPA, consulted with CEQ pursuant to NEPA regulations found in 40 CFR 1506.11 to develop alternative NEPA arrangements for implementation of this rule. These alternative

arrangements, which take the place of an Environmental Impact Statement, provide that Coast Guard and DHS will consider the potential for significant impacts to the human environment from this rule during implementation of the rule. The Alternative Arrangements were posted to the Deepwater Horizon Web site (http://www.dhs.gov/xabout/laws/gc_1283521666674.shtm) on July 13, 2010, and remain available to interested parties at this Web site. The Alternative Arrangements are also available in the docket as indicated under **ADDRESSES** above.

Under the alternative arrangements, each COTP consults with the Area Committee and pertinent Regional Response Teams to determine what assets may be made available to address the SONS using the Area Contingency Plans (ACP). Each ACP includes an annex containing a Fish and Wildlife and Sensitive Environments Plan prepared in consultation with the U.S. Fish and Wildlife Service and NOAA and other interested natural resource management agencies and parties (including coastal zone management agencies). The annex addresses fish and wildlife resources and their habitat, and other areas the Area Committee recommends be considered sensitive environments. The annex provides the information and procedures to immediately and effectively respond to discharges that may adversely affect fish and wildlife and their habitat and sensitive environments. Determination of the needed response resources considers local and regional factors such as environmental risks, logistic limitations, and unique local or regional circumstances.

The determination by each COTP regarding available assets in the area includes considering the development of equipment relocation and backfilling (*i.e.*, cascade plans) which will expand the interlocking response back up of the various OSROs, and integrates military resources which have previously been kept independent of supporting the civilian OSROs. The COTP also considers available information on the availability of current response resources, particularly in areas with large vessel traffic lanes, heavy vessel traffic, oil refineries, oil storage and pipeline facilities, seasonal risks associated with weather, and trends associated with weather, currents and tides.

Dated: December 2, 2010.

Robert Papp,

Admiral, U.S. Coast Guard, Commandant.

Lisa P. Jackson,

Administrator, U.S. Environmental Protection Agency.

[FR Doc. 2010-32018 Filed 12-20-10; 8:45 am]

BILLING CODE 9110-04-P; 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA EPA-HQ-OAR-2005-0161; FRL-9241-4]

RIN 2060-AQ31

Regulation of Fuels and Fuel Additives: Modifications to Renewable Fuel Standard Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing amendments to certain of the Renewable Fuel Standard program regulations that were published on March 26, 2010, and that took effect on July 1, 2010 ("the RFS2 regulations"). Following publication of the RFS2 regulations, promulgated in response to the requirements of the Energy Independence and Security Act of 2007, EPA discovered some technical

errors and areas within the final RFS2 regulations that could benefit from clarification or modification. In a direct final rule and parallel notice of proposed rulemaking published on May 10, 2010, EPA included language to amend the regulations to make the appropriate corrections, clarifications, and modifications. However, EPA received adverse comment on a few provisions in the direct final rule and, on June 30, 2010, withdrew those provisions prior to their effective date of July 1, 2010. In today's action, EPA is addressing the comments received on the portions of the direct final rule that were withdrawn and is taking final action regarding the withdrawn provisions based on consideration of the comments received.

DATES: This final rule is effective on January 1, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2005-0161. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are

generally available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Docket, ID No. EPA-HQ-OAR-2005-0161, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-9744.

FOR FURTHER INFORMATION CONTACT:

Megan Brachtel, Compliance and Innovative Strategies Division, Office of Transportation and Air Quality (6405J), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., 20460; telephone number: (202) 343-9473; fax number: (202) 343-2802; e-mail address: brachtel.megan@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this final rule include those involved with the production, importation, distribution, and sale of transportation fuels, including gasoline and diesel fuel and renewable fuels such as ethanol and biodiesel. Regulated categories and entities affected by this action include:

Category	NAICS codes ^a	SIC codes ^b	Examples of potentially regulated parties
Industry	324110	2911	Petroleum refiners, importers.
Industry	325193	2869	Ethyl alcohol manufacturers.
Industry	325199	2869	Other basic organic chemical manufacturers.
Industry	424690	5169	Chemical and allied products merchant wholesalers.
Industry	424710	5171	Petroleum bulk stations and terminals.
Industry	424720	5172	Petroleum and petroleum products merchant wholesalers.
Industry	454319	5989	Other fuel dealers.

^a North American Industry Classification System (NAICS).

^b Standard Industrial Classification (SIC) system code.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities would be regulated by this action, you should carefully examine the applicability criteria of Part 80, subpart M of title 40 of the Code of Federal Regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person in the **FOR FURTHER INFORMATION CONTACT** section above.

II. Renewable Fuel Standard (RFS2) Program Amendments

EPA issued final regulations implementing changes to the Renewable Fuel Standard program required by EISA on March 26, 2010, at 75 FR 14670 ("the RFS2 regulations"). Following publication of the RFS2 regulations, EPA discovered some technical errors and areas that could benefit from clarification or modification and, in parallel proposed and direct final rules published on May 10, 2010 (75 FR 26049, 75 FR 26026), included amendments to the regulations to correct these deficiencies. EPA received adverse comment on a few of the amendments and therefore, on June 30,

2010, withdrew the portions of the direct final rule that were the subject of adverse comment (75 FR 37733). The withdrawn provisions consist of the following:

—Certain of the amendments to § 80.1401, specifically those which moved the definitions of "actual peak capacity," "baseline volume," and "permitted capacity" from § 80.1403(a), revised the definition of "actual peak capacity" to clarify how it is calculated, and revised the definition of "permitted capacity" to clarify the dates by which permits used to establish a facility's permitted capacity must have been issued or revised;

- § 80.1425, which clarified that RINs generated after July 1, 2010, may only be generated and transferred using the EPA Moderated Transaction System (EMTS) and will not be identified by a 38-digit code, and that the value of EEEEEEEE in a batch-RIN will be determined by the number of gallon-RINs generated for the batch;
- § 80.1426(d)(1), § 80.1426(f)(3)(iv), and § 80.1426(f)(3)(v), which clarified that a unique batch code in the RIN, or its equivalent in EMTS, is used to identify a batch of renewable fuel from a given renewable fuel producer or importer;
- Table 2 to § 80.1426, which clarified the extent to which renewable fuel producers must use advanced technologies in order for their fuel to qualify for certain pathways identified in Table 1 to § 80.1426;
- § 80.1426(f)(12), which clarified the requirements for gas used for process heat at a renewable fuel facility to be considered biogas for purposes of Table 1 to § 80.1426;
- § 80.1452(b), which clarified that RINs must be generated in EMTS within five business days of being assigned to a batch of renewable fuel and clarified the information required to be submitted via EMTS for each batch of renewable fuel produced or imported; and,
- § 80.1452(c), which clarified that transactions involving RINs generated on or after July 1, 2010, must be conducted via EMTS within five business days of a reportable event, and clarified the meaning of the term “reportable event” and the information required to be submitted via EMTS for each transaction involving RINs generated on or after July 1, 2010.

EPA published a parallel proposed rule (75 FR 26049) on the same day as the direct final rule (75 FR 26026). The proposed rule invited comment on the provisions of the direct final rule and indicated that a second comment period would not be offered on the proposal in the event that portions of the direct final rule were withdrawn in response to adverse comment. In this action, we are responding to the comments received on the portions of the direct final rule that were subsequently withdrawn, and we are taking final action regarding the withdrawn provisions based on consideration of these comments. We are also finalizing a minor amendment to § 80.1451(b)(1)(ii)(M) which was described in the preamble to the direct final rule and was included in the accompanying regulations, but the amendatory language prefacing the

regulation inadvertently omitted reference to it. As a result, the Office of the Federal Register did not codify the amended regulation even though it was included in the direct final rule. The modification simply removes the words “of renewable fuel” to make the regulatory language consistent with other entries in the subparagraph. We received no adverse comment on this proposed amendment, and we consider it a non-substantive technical correction.

A. Permitted Capacity for Renewable Fuel Production Facilities

In the final RFS2 regulations, we specified in § 80.1403(a)(1) that the “baseline volume” of fuel that is exempt from the 20 percent greenhouse gas (GHG) reduction requirement at grandfathered facilities described in §§ 80.1403(c) and (d) would be determined by their “permitted capacity” or, if that could not be determined, by their “actual peak capacity.” In the registration provisions at § 80.1450(b)(1)(v)(B), we identified the permits that are relevant in establishing “permitted capacity.” Specifically, for facilities that commenced construction on or before December 19, 2007, the final RFS2 regulations stated that “permitted capacity” is based on permits issued or revised no later than December 19, 2007. For ethanol facilities that commenced construction after December 19, 2007, and on or before December 31, 2009, and that are fired with natural gas, biomass, or a combination thereof, the RFS2 regulations stated that “permitted capacity” is based on permits issued or revised no later than December 31, 2009.

In the final RFS2 regulations, we did not include in the definition of “permitted capacity” references identical to those placed in the registration section to the latest issuance dates of permits that could be used to establish “permitted capacity.” Therefore, in the direct final rule published at 75 FR 26026 (May 10, 2010), EPA modified the definition of “permitted capacity” to specify the same dates for relevant permits as were provided in the registration provisions in the final RFS2 regulations. We believed that such a revision would improve the clarity of the regulations, while not changing the substance of the requirements.

However, we received adverse comments during and after the comment period expressing concern over the modified definition of “permitted capacity,” which commenters stated

posed “new constraints” on the qualification of eligible fuel volumes that could be exempt at grandfathered facilities. One commenter described an ethanol facility fired by natural gas, and therefore potentially eligible for an exemption from the 20 percent GHG reduction requirement pursuant to § 80.1403(d), for which permits were issued and construction completed prior to December 31, 2009, and for which an application for a permit revision seeking an increase in permitted capacity was submitted to the permitting authority in 2008. The commenter claimed that the revised permit reflected the facility’s original plant design, however the permitting authority did not issue a revised permit for the facility until March 2010. According to the revised definition of “permitted capacity” in the regulations as amended by the direct final rule and according to the original registration requirements of the final RFS2 regulations, permits issued or revised after December 31, 2009, could not be used to establish “permitted capacity,” and therefore the additional capacity in the revised permit could not be included in the facility’s baseline volume. The commenter explained that many ethanol producers originally applied for permits for their facilities based on conservative initial production volumes supported by their plant designers’ emission guarantees, and that after an initial period of operation, performance testing, and fine tuning of operations, they have found that they could produce greater volumes. They explained that many developers of ethanol facilities, including their own, sought to obtain construction permits without going through EPA’s New Source Review (NSR) program, and were able to do so by obtaining construction permits that specified less than 100 tons per year of emissions even though their facilities were capable of emitting more and producing a correspondingly greater volume of renewable fuel. In May 2007, when EPA changed to 250 tons per year the emissions threshold that would trigger NSR for ethanol production facilities, these plants then found it in their interest to seek increases in their permitted capacity beyond that specified in their earlier-issued permits, since they could do so without triggering NSR. The commenter argued that ethanol facilities should be allowed to use the capacity in such later-issued permits, including their own March 2010 revised permit, to establish their “permitted capacity” under RFS2.

We also received additional comments after the close of the

comment period from a collective group of ethanol facilities in Illinois referencing the initial commenter's comments that the cut-off dates in the revised definition of "permitted capacity" created restrictions for their facilities that would prohibit them from having the "inherent capacity" of their facilities qualify for the grandfathering exemption under RFS2. In addition, the commenters referenced what they felt was an inequitable allowance for facilities located in states that did not place production limits in their air permits, who therefore were allowed to use "actual peak capacity" (which is based on actual production records¹) to establish their baseline volume exempt from the 20 percent GHG reduction requirement under RFS2. The commenters further cited potential cost effects if their full "inherent capacity" was not allowed to be included in the exempt baseline volume, such as the additional costs associated with either plant modifications (presumably needed to qualify their non-exempt fuel as meeting the 20 percent GHG reduction requirement) or exporting the non-exempt volume of fuel for consumption outside of the United States.

The commenters proposed revised language for the definition of "permitted capacity" that would allow an extended time frame for facilities to seek permit modifications to reflect their "inherent capacity." They proposed that EPA modify the final RFS2 regulations to allow facilities to use as their baseline volume the capacity limits in permits issued by regulatory authorities which were applied for within three years after start-up of a new or expanded facility (but not less than one year after the effective date of the final rule) and issued within not more than two years thereafter. The commenters also stated that many facilities had no notice of EPA's time limitation on those permits in either the proposed or final RFS2 rule (74 FR 24904, published May 26, 2009, and 75 FR 14670, published March 26, 2010) and therefore had inadequate notice to make appropriate plans to apply for and obtain new permits within the RFS2 deadlines. They further expressed concern that the permit cut-off date that restricts grandfathered production capacity precedes the date of

the proposed rule. They also cited a statement made in the proposed RFS2 rule that EPA's guiding principal is to "allow production increases within a plant's inherent capacity" (74 FR 24904, 24926, May 26, 2009). One commenter also referred to EPA's RFS2 Summary and Analysis of Comments, p. 3–139 (Pub. No. EPA–420–R–10–003, February 2010), in which, they state, EPA assumed that permitted capacity would likely reflect maximum inherent capacity. The commenter said that such an assumption would be valid for some situations, but not valid for others, especially with the limitations EPA intended to place on the date of permits that could be used to establish "permitted capacity."

The Energy Independence and Security Act of 2007 (EISA or "the Act") provides that the 20 percent GHG reduction requirement applies to "new facilities" that commence construction after the date of enactment. It also provides that "for calendar years 2008 and 2009, any ethanol plant that is fired with natural gas, biomass, or any combination thereof is deemed to be in compliance with [the] 20 percent reduction requirement * * *". In the proposed RFS2 rule we noted that the term "new facility" is not defined in EISA and, therefore, that EPA would need to interpret the term in the context of the RFS2 regulations. We also noted ambiguity in the statutory section related to ethanol facilities that commenced construction in 2008 and 2009 and that are fired with natural gas or biomass, in that the Act was not clear as to whether these facilities should be "deemed compliant" with the 20 percent GHG reduction requirement for only the two years specified, or indefinitely. For both types of facilities, we believe the approach we are finalizing in this rule provides an appropriate method of implementing statutory requirements that is consistent with the text and objectives of the statute, while also leading to a workable program.

First, with respect to "deemed compliant" ethanol facilities fired with natural gas or biomass for which construction commenced after enactment of EISA but on or before December 31, 2009, we believe, as discussed in the proposed RFS2 rule, that Congress could have intended that these facilities are only "deemed compliant" for those two years or for a longer or indefinite time period (assuming they continued to be fired with natural gas or biomass). The ambiguity can be seen through a comparison of the first sentence of EISA Section 210(a) and the second sentence. The first sentence provides that "for

calendar year 2008, transportation fuel sold or introduced into commerce in the United States" that is produced by facilities that commenced construction after the date of enactment of EISA must meet the 20 percent GHG reduction requirement. This sentence is very specific, applying directly to "transportation fuel" that is "sold or introduced into commerce" in 2008. The second sentence in this section does not specifically refer to fuel, but instead refers to "any ethanol plant that is fired with natural gas, biomass, or any combination thereof" and provides that such facilities are "deemed compliant" with the 20 percent GHG reduction requirements of the Act. The sentence is introduced by the words "[f]or 2008 and 2009." Since fuel from facilities that commenced construction prior to the date of enactment is already exempt from the 20 percent GHG reduction requirement by virtue of CAA Section 211(o)(2)(A)(i), the "deemed compliant" provision in the second sentence of EISA 210(a) clearly applies to ethanol facilities that commenced construction after that date.

We believe the scope of the exemption is ambiguous, however, because Congress did not specifically refer to fuel sold in specified years in the second sentence, as they did in the first sentence, but instead referred to "ethanol plants." Because of this construct, it is unclear exactly what fuel should be covered by the exemption. EPA identified two general approaches to interpreting this provision in its proposed rule: Either interpreting it to provide a limited two year exemption, or interpreting it to provide an exemption for fuel produced by qualifying facilities that would be of equal duration to the exemption provided in CAA Section 211(o)(2)(i) for fuel from facilities that commenced construction prior to EISA enactment. We reasoned that it would be a harsh result for investors in these new facilities, and generally inconsistent with the energy independence goals of EISA, to interpret the Act such that these facilities would only be guaranteed two years of participation in the RFS2 program. Therefore in our final RFS2 regulations we provided an indefinite exemption from the 20 percent GHG reduction requirement for their baseline volumes (determined through either "permitted capacity" or, if "permitted capacity" cannot be determined, "actual peak capacity") provided that they continue to be fired by natural gas, biomass, or a combination thereof.

Contrary to the commenters' assertions, nothing in EISA suggests that

¹ Pursuant to § 80.1403(a)(3)(i) in the RFS2 regulations issued March 26, 2010, "actual peak capacity" is based on the last five calendar years prior to 2008 for facilities qualifying under § 80.1403(c) unless no such capacity exists, in which case it is based on any calendar year after start-up during the first three years of operation. For facilities qualifying pursuant to § 80.1403(d), "actual peak capacity" is based on any calendar year after start-up during the first three years of operation, as specified in § 80.1403(a)(3)(ii).

these “deemed compliant” facilities should be allowed to continually expand their production beyond levels achieved in 2008 and 2009 simply because they could do so without additional physical construction. Rather, the approach EPA has adopted of seeking to limit the exempt volume at these grandfathered facilities to that which was lawfully allowed in applicable permits issued no later than December 31, 2009, is fully consistent with the statutory references to 2008 and 2009.

We believe it is consistent with the statutory text to limit the grandfathered production from “deemed compliant” facilities to the maximum volume allowed under applicable permits in the 2008 to 2009 timeframe. We also believe that this approach is supported by the same policy considerations, discussed below, that have led us to a similar approach for facilities that commenced construction prior to EISA enactment. We have only deviated from this concept with respect to those “deemed compliant” facilities for which capacity cannot be determined by reference to applicable permits. Those facilities, some of which may not have been operational in the 2008 to 2009 timeframe, by necessity are allowed to establish their baseline volume by reference to actual production levels (“actual peak capacity”) within a specified time period after they commence operations. For both “deemed compliant” facilities and facilities that commenced construction prior to EISA enactment, we believe that allowing facilities to establish their baseline volume by actual production for any calendar year within the first three years of operation is appropriate because it allows a reasonable amount of time to correct possible production launch problems. This is an exception to the general rule, and is allowed only if permit limits are not available to establish baseline volume.

While there may be instances, as suggested by commenters, in which facilities that use “actual peak capacity” to establish their baseline volume could come closer to obtaining an exemption for what the owner may consider their “inherent capacity” than those establishing their baseline volume through permit limits, EPA notes that this need not always be the case. For example, some plants, whose baseline volume is established through “actual peak capacity” because they do not have a capacity stated on a permit, may not, due to certain start-up problems or market conditions, actually produce up to their projected or potential capacity during the first three years of operation.

Nonetheless, they are required under the final RFS2 regulations to use the maximum annual production during these first three years of operation to establish their baseline volume.² On the other hand, some plants that applied for permits reflecting a certain “permitted capacity” that may have been based on their facility’s projected maximum capacity, but who in practice may not be able to achieve this capacity or do not do so for some period of time due to market conditions, are allowed under the final RFS2 regulations to use this higher “permitted capacity” to establish their baseline volume. In these scenarios, baseline volume established through “permitted capacity” may be greater than the baseline volume that could be achieved by a comparable facility by reference to actual production during the first three years of operation. Thus, while it is true that “permitted capacity” does not always reflect potential capacity, “actual peak capacity” also does not necessarily reflect a facility’s potential capacity, as demonstrated in our examples above. Therefore, we disagree with the commenters’ statement that facilities using “actual peak capacity” to establish their baseline volume have an unfair advantage over facilities that must use their “permitted capacity” to establish their baseline volume.

With respect to facilities that commenced construction before the date of enactment of EISA, commenters also state that EPA should interpret the EISA grandfathering provisions to allow volumes from such facilities to be exempt up to the maximum of their “inherent capacity.” The statute does not use the term “inherent capacity,” and instead applies the 20 percent GHG reduction requirement to “new facilities that commence construction” after the date of enactment. In the RFS2 rulemaking, EPA addressed the issue of how to implement this grandfathering provision by defining both the facilities and their production volumes that would be grandfathered, and considering all other production volumes to be subject to the 20 percent GHG reduction threshold. EPA identified the grandfathered volumes in two steps. First, EPA identified the facilities that could be considered available for grandfathering by using definitions of “facility” and “commence construction” that were similar but not identical to those used in EPA’s

stationary source Prevention of Significant Deterioration (PSD) permitting program. After identifying these facilities, EPA followed a second step to identify what volumes at those facilities would be grandfathered. In this final rulemaking, EPA is addressing the same issue of what volume should be grandfathered as we did for the final RFS2 rulemaking.

EPA rejected the approach of determining that any and all volumes produced at qualifying facilities should be considered grandfathered. EPA also rejected the approach specified in the NPRM of requiring facilities to report on expenses for replacements, additions, and repairs so that EPA could determine on a case-by-case basis if such activities warranted considering the facility as effectively “new” for purposes of the grandfathering provisions. Instead, EPA chose an approach that extends an indefinite exemption to baseline volumes at qualifying facilities, and defines the grandfathered volume by reference to “permitted capacity” contained in air permits that govern the operation of a facility at the time of the statutory deadline. If such capacity is not stipulated in the permit, then the baseline is established by “actual peak capacity” achieved within either the last five calendar years prior to 2008 or, if the plant is not yet in operation, the first three years after start-up. The “permitted capacity” or the actual operations history of the plant would define a baseline volume, and increases above 105 percent of this volume would be considered production by a new facility. These criteria are objective and their use avoids the case-by-case decision-making that would be required if less objective criteria were applied.

In this rulemaking, EPA proposed to clarify but not change this approach, and commenters have suggested that EPA now change the approach substantially. EPA rejects this request for a change in approach for many of the same reasons given in the preamble to the final RFS2 regulations.

First, EPA notes that the statute does not define the terms “new facility” or “commence construction,” providing EPA discretion to interpret these terms in a reasonable fashion that promotes the goals of the statute. EPA notes that there were no objections to how EPA defined the universe of facilities that can produce grandfathered renewable fuel in the proposed RFS2 regulations. Rather, commenters raised issues regarding what volumes and years of production from these facilities (and from any modifications or expansions to the facilities) should be considered grandfathered. The only issue raised in

² We note that while some air permits may not contain restrictions on plant capacity, most contain restrictions on emission rates, fuel consumption, throughputs, and sizes of vessels. Thus, there are some limitations on capacity that are related to restrictions on these parameters in the air permit.

the current set of comments, however, is the extent to which volumes above those allowed at the time of the statutory deadlines should be grandfathered.

As in the RFS2 rulemaking, EPA is faced with two basic approaches. The first approach is raised by commenters who suggest applying the concept of “maximum capacity” or “inherent capacity” on a case-by-case basis. Some commenters have suggested this could be limited in time to a set number of years in the future. Under this approach, EPA would evaluate each permit revision that occurs and would need to determine if the changes undertaken were within the “inherent capacity” of a qualifying facility. If they were not, the volumes would be considered produced by a new facility for which construction commenced after the statutory deadline.

EPA does not agree that this is either a required or an appropriate approach. EISA does not define the phrase “new facilities that commence construction,” nor does it refer to or require that EPA follow the approach suggested by the commenters. As was the case in the proposed and final RFS2 rules, EPA is concerned about the lack of objectivity and concreteness in applying a concept such as “inherent capacity.” There is no clear or concrete meaning to this term. In practice, renewable fuel facilities can and do evolve over time. A facility and its operations are typically in a constant state of flux to address changing circumstances and to optimize production under those circumstances. These changing circumstances can involve a full range of activities that may include changes in equipment or operations, with any of these changes ranging from minor to major. Once one aspect of facility design or operation that constrains capacity is optimized, another aspect becomes the constraining factor. This process, which can include what is often referred to as debottlenecking, is iterative and can continue indefinitely. Thus the terms “inherent capacity,” “nameplate capacity,” and “design capacity” have meaning only in a general or broad sense. EPA does not believe it could develop criteria that would fairly and objectively define these terms. Without such criteria, the case-by-case analysis to implement such an approach would be difficult to accomplish in a fair and consistent manner, thus making such an approach undesirable. Instead, EPA’s approach is definitive, allowing in all cases 105 percent of “permitted capacity” or, if permit limits are not available, 105 percent of “actual peak capacity” to establish baseline volumes. The 105 percent factor allows a

consistent and definitive allowance beyond “permitted capacity” or “actual peak capacity” measures. As stated in the preamble to the final RFS2 rule, it provides an allowance for debottlenecking and minor changes that may be brought about by normal maintenance that is consistent with the proper operation of a facility, while being sufficiently small so as to not encourage plant expansions that are unrelated to debottlenecking and normal maintenance procedures (75 FR 14670, 14689, March 26, 2010). EPA believes that such an allowance is consistent with the concept of applying the 20 percent GHG reduction requirement to “new facilities that commence construction” after EISA, while not also introducing a difficult case-by-case implementation approach to the rules as suggested by the commenters.

Under the approach taken in the final RFS2 rule and clarified in the direct final rule, future changes in production above 105 percent of the baseline volume would be treated as production by a new facility that commenced construction after the statutory deadline. Typically the increase in production, whether caused by a permit change or otherwise, would be the result of changes made in order to increase production, whether physical changes in equipment or changes in operation. These changes would make the plant different in a way that would allow it to produce more renewable fuel. Implementation of these changes would be considered construction, whether it is from a process of physical construction, physical replacement, change in operation, redesign, or reconfiguration. EPA broadly interprets the terms “new” and “construction” in the final RFS2 rule to encompass the kinds of changes typically taken to increase production.

EPA recognizes that the approach we have taken in the final RFS2 rule encompasses a broad variety of physical, operational, and other efficiency changes. EPA favors its approach because it gives reasonable meaning to the terms in EISA in a way that provides clear and objective criteria, and it avoids the problems and complexities noted above with the case-by-case approach that tries to implement an “inherent capacity” criterion. It is also a reasonable way to further the goals of the grandfathering provision and for evaluating future increases in production.

By arguing that the “inherent capacity” of a plant built before enactment must be grandfathered regardless of permit limitations on the

date of enactment, commenters seem to be equating the term “construction” in the statute with “physical construction.” Their rationale is that if the increased volumes are not derived from new physical construction of a facility after the date of enactment, then any and all fuel from that grandfathered facility must be covered by the exemption. However, the term “construction” is not defined in EISA and need not be viewed in this manner. For example, Congress defined the term “construction” in CAA section 169(2) for the PSD program to include “modifications” as defined in CAA section 111(a)(4). That term is defined in the statute to include “any change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” The definition of “commence construction” adopted in the final RFS2 regulations specifically incorporates by reference the definition of “begin actual construction” from the PSD regulations, where the term “construction” is defined as “any physical change or change in the method of operation * * * that would result in a change in emissions.” (See 40 CFR 80. 1403(a)(4), 52.21(b)(1) and 53.21(b)(8).) EPA’s treatment of post-enactment “construction” under the final RFS2 regulations to include operational modifications leading to the production of additional renewable fuel is therefore comparable to the approach adopted by Congress in the PSD program with respect to modifications that may lead to increased emissions.

The approach EPA adopted in the final RFS2 rule, and which we reaffirm today, reasonably promotes the goals of this statutory provision. EPA’s analysis as part of the RFS2 rulemaking showed that the aggregate volumes of grandfathered ethanol for the entire industry would be approximately 15 billion gallons (74 FR 24904, 24925, May 26, 2009). Given the volume mandates and GHG reduction thresholds for the other three categories of renewable fuel (advanced biofuel, biomass-based diesel, and cellulosic biofuel), 15 billion gallons is (by coincidence) approximately the maximum amount of grandfathered ethanol that could be used in the RFS2 program for compliance purposes.³ In addition, EISA provides a considerable benefit to facilities claiming exemption from the 20 percent GHG reduction threshold. Such an exemption is not

³ Table 1.1.1 from “Renewable Fuel Standard Program (RFS2) Regulatory Impact Analysis” (EPA-420-R-10-006); February 2010.

provided to similar facilities for which construction commences after the statutory deadlines. The exemption reasonably preserves the investment decisions of owners made prior to the time of enactment of EISA. Those investment decisions were clearly based on the practices of the facilities constructed on or before the statutory deadlines, including any permit-related constraints in existence at the time. Any future increases in production based on future permit changes could generally be an enhancement to the value of the facility and would be based on future decisions, not investment decisions made prior to enactment of EISA.

We acknowledge the statement we made in the proposal for the RFS2 regulations, referenced by one of the commenters, that “our guiding philosophy of protecting historical business investments that were made to comply with the provisions of RFS1 are realized by allowing production increases within a facility’s inherent capacity,” (74 FR 24904, 24926, May 26, 2009). We need to point out, however, that the statement was made in the context of soliciting comment on allowing a 10 percent tolerance level above “permitted capacity” and, as noted above, we proposed that “permitted capacity” would be ascertained at the time of facility registration. The 10 percent allowance was, therefore, proposed for comment as a straightforward and readily-implementable mechanism to reflect in grandfathered volumes as much of a plant’s “inherent capacity” as practical while avoiding case-by-case assessments into the future indefinitely. In the same paragraph in the proposal, we further state that “at the same time, the alternative of requiring compliance with the 20% GHG reduction requirement for increases in volume above 10% over the baseline volume, [*sic*] would place new volumes from grandfathered facilities on a level playing field with product from new grass roots facilities. We believe that a level playing field for new investments is fair and consistent with the provisions of EISA,” (74 FR 24904, 24926, May 26, 2009).

Based on comments received on the RFS2 proposed rule, we decided to reject the 10 percent tolerance and “to interpret the exemption of the baseline volume of renewable fuel from the 20 percent GHG reduction requirement as extending indefinitely.” We noted that any tolerance provided could, therefore, “be present in the marketplace for a considerable time period.” Furthermore, we also stated that “increases in volume of 10 percent or greater could be the result of modifications other than

debottlenecking,” and instead adopted a 5 percent tolerance level (75 FR 14670, 14689, March 26, 2010). We believe that these statements from the preamble to the RFS2 final rule are consistent with the arguments we have set forth above.

We disagree with the commenters’ statement that facilities had inadequate notice of the time limitations for permits that could be used to establish baseline volume that is exempt from the 20 percent GHG reduction requirement. The preamble to the proposed rule stated that “the facility registration process * * * would be used to define the baseline volume for individual facilities. Owners and operators would submit information substantiating the nameplate capacity of the plant, as well as historical annual peak capacity if such is greater than nameplate capacity,” (74 FR 24904, 24926, May 26, 2009). In the proposal, nameplate capacity was defined in terms of permitted capacity. Furthermore, in discussing the facility registration process, the preamble stated that “in order to determine what production volumes would be grandfathered and thus deemed to be in compliance with the 20% GHG threshold, we would require * * * information necessary to establish [a facility’s] renewable fuel baseline volume * * *” (74 FR 24904, 24942, May 26, 2009). These discussions made it clear that the baseline volume would be determined in the registration process, and they did not indicate that making such determinations would be an ongoing process into the future. Under the RFS2 proposal, registration was to occur by January 1, 2010, or 60 days prior to commencement of production, whichever was later. The January 1, 2010, proposal date for the submission of permits to establish baseline volume with registration materials is fully consistent with the provision in the final rule that permits used to establish “permitted capacity” for “deemed compliant” facilities must have been issued no later than December 31, 2009, and for other grandfathered facilities by December 19, 2007. While the proposal would have allowed grandfathered facilities that commenced production after January 1, 2010, additional time to submit their registration materials, the preamble discussion did not suggest that this would afford them the opportunity to use permits issued after the relevant time periods referenced in EISA for purposes of establishing baseline volume. In addition, in describing EPA’s basic proposal, EPA explained that, for facilities that commenced construction prior to EISA

enactment, volumes greater than baseline volume “which may typically be due to expansions of the facility which occur after December 19, 2007, would be subject to the 20% GHG reduction requirement in order for the facility to generate RINs for the incremental expanded volume. The increased volume would be considered as if produced from a ‘new facility’ which commenced construction after December 19, 2007.” EPA believes that these preamble statements provided adequate notice to the regulated community that EPA was considering limitations on the dates of permits that could be used to establish baseline volume, and also believes that commenters were reasonably apprised based on the discussion of dates in the preamble and the dates referenced in the statute that the permit cut-off dates ultimately selected for this purpose were under consideration.

As stated previously, the definition of “permitted capacity” in the direct final rule was revised to include the same permit cut-off dates referenced in the existing unamended registration section in the final RFS2 regulations. The direct final rule would not have established these cut-off dates as new requirements, but would merely have provided clarity to the existing regulations by placing references to permit dates in the definition of “permitted capacity” that are comparable to those that already existed in § 80.1450(b)(1)(v)(B). Commenters clearly had notice of these permit cut-off dates in commenting on the direct final rule, and brought their concerns to EPA’s attention in the context of this rulemaking. EPA has considered these comments and has decided not to revise the regulations in the manner they have proposed, but instead, for all of the reasons discussed above, to finalize in this rule the same definition of “permitted capacity” that was included in the direct final rule and parallel proposal.

EPA is also finalizing the amendments included in the direct final rule and parallel proposal that we did not receive adverse comment on, but that were tied to the revised definition of “permitted capacity” and therefore were also withdrawn in the June 30, 2010, notice (75 FR 37733). These related amendments move the definitions of “actual peak capacity,” “baseline volume,” and “permitted capacity” from their original locations at § 80.1403(a) to § 80.1401 in order to consolidate them with other definitions used in 40 CFR part 80, subpart M. They revise the definition of “actual peak capacity” to clarify that actual peak capacity for facilities that commenced

construction prior to December 19, 2007, but that did not have at least one calendar year of actual production prior to 2008, should be based on any calendar year after startup during the first three years of operation. They also clarify that for facilities that commenced construction after December 19, 2007, but before January 1, 2010, that are fired with natural gas, biomass, or a combination thereof, “actual peak capacity” is based on any calendar year after startup during the first three years of operation. These amendments, which are closely tied to changes to the definition of “permitted capacity” that we are finalizing today, are also being finalized as they were proposed at 75 FR 26049 (May 10, 2010).

B. Treatment of Renewable Identification Numbers

In order to facilitate the transition from RFS1 to RFS2, many of the final RFS2 regulations clarified the differences between how Renewable Identification Numbers (RINs) are treated under each program. However, in the final RFS2 rule, the section on product transfer documents (PTD) requirements was not clear about the information that must be on PTDs for RINs under the RFS2 program, and we issued several amendments to § 80.1453 in the direct final rule to clarify the PTD requirements under RFS2. We did not receive any adverse comment on these amendments.

In conjunction with the amendments to § 80.1453, we proposed amendments to § 80.1425, which provides a description of the 38-digit RIN. The amendments were meant to clarify that RINs generated under RFS2 are not identified by a 38-digit code, but rather that most of the information contained within the RFS1 38-digit code is entered and made available in the EPA Moderated Transaction System (EMTS) as separate data elements. We also proposed amendments to § 80.1426(d)(1), (f)(3)(iv), and (f)(3)(v) to clarify that either the batch (BBBBB) component of the RIN or its EMTS-equivalent can be used to identify a particular batch of renewable fuel.

We received adverse comment from several parties on the proposed amendments to § 80.1425, who took issue with the elimination in EMTS of the SSSSSSSS and EEEEEEEE components (start and end numbers) of the RFS1 38-digit RIN. The commenters expressed concern that the 38-digit code was being abandoned and claimed this proposed change would impact a regulated party's right and ability to maintain an independent accounting of their RINs at a unit (gallon-RIN) level.

They also claimed that without this information, attempts to manage RIN transactions would be problematic for the regulated community. Furthermore, the commenters stated that they saw no steps taken in the rulemaking process that would have notified industry of EPA's intent to move away from the 38-digit RIN.

In the preamble to the RFS2 NPRM, we outlined the concept for EMTS and described the circumstances experienced under the RFS1 program that led us to conclude that such a system would be necessary and preferable to the RFS1 approach to RIN generation and transaction. We stated that “in implementing RFS1, we found that the 38-digit standardized RINs have proven confusing to many parties in the distribution chain. Parties have made various errors in generating and using RINs. * * * We have also seen incorrect numbering of volume start and end codes,” (74 FR 24974). In the preamble to the NPRM, we also acknowledged that “once an error is made within a RIN, the error propagates throughout the distribution system. Correcting an error can require significant time and resources and involve many steps,” (74 FR 24974). Finally, we noted that “incorrect RINs are invalid RINs. If parties in the distribution system cannot track down and correct the error made by one of them in a timely manner, then all downstream parties that trade the invalid RIN will be in violation. Because RINs are the basic unit of compliance for the RFS1 program, it is important that parties have confidence when generating and using them,” (74 FR 24974).

We proposed and finalized EMTS in the RFS2 rulemaking process as the solution to address most, if not all, of these issues, and to handle the increasingly complex RIN generation and transaction requirements under RFS2 due to the increased volume mandates and four categories of renewable fuel. While the commenters are correct that EMTS does not employ the 38-digit RIN as it was originally conceived for the RFS1 program, the system is designed to allow users to transact RINs in a generic way while still maintaining the ability to know any individual RIN's source at a company and facility level. We described this change in the preambles to both the proposed and final RFS2 regulations. (See 74 FR 24975 and 75 FR 14733.) Specifically, in the preamble to the final RFS2 regulations, we stated, “one major advantage of EMTS * * * is that the system will simplify trading by allowing RINs to be traded generically. Only some specifying information will be

needed to trade RINs, such as RIN quantity, fuel type, RIN assignment, RIN year, RIN price or price per gallon.

* * * The actual items of transactional information covered under RFS2 are very similar to those reported under RFS1,” (75 FR 14733).

Indeed, all major components of the RIN as conceived under the RFS1 program are used in EMTS with the exception of the “S” and “E” starting and ending RIN values. The S and E components of the 38-digit RIN served two purposes under RFS1. One was to determine the number of gallon-RINs contained in a batch-RIN segment, calculated by subtracting the ending RIN value from the starting RIN value. The second use was to ensure that the number of gallon-RINs represented by a batch-RIN did not grow or decrease as it was passed from buyer to seller, in many cases multiple times. As noted above, under RFS1, an overlap or duplication of S and E codes between transactions was an indication that something had gone wrong during the exchange of RIN information.

Under RFS2, EMTS performs transactions of individual RINs (the RFS1 equivalent of gallon-RINs) with a simple reference to RIN quantity, and the system does not use S and E components. Being a closed system, there is no opportunity for a RIN owner to purposefully or accidentally increase or decrease the number of RINs originally associated with a batch of renewable fuel. The original RIN quantity may be subdivided into smaller parts as the RINs and renewable fuel are transferred from one party to another, but EMTS accounts for the original total number of RINs at all times. This feature allows EMTS to manage RIN quantities without the need for S and E components.

We believe that the comment we received suggesting that a regulated party's right and ability to maintain an independent accounting of their RINs at a unit level would be negatively affected by eliminating the use of the 38-digit RIN is unfounded. In the preambles to both the proposed and final RFS2 rules, we discussed the fact that, like under the RFS1 program, there is no “good faith” provision with respect to RIN ownership. To help companies manage their RINs in such a “buyer beware” environment, we proposed and finalized that a RIN purchaser can accept or reject RINs from specific RIN generators or from classes of RIN generators (74 FR 24975, 75 FR 14733). In practice, this allowance has translated into a function within EMTS that allows a RIN account holder to block RINs generated by specific companies and/or facilities.

EMTS now also allows a RIN transferee to review details of RINs offered by a transferor, such as the RIN generators' company and facility ID numbers, prior to accepting or rejecting the transaction. In this way, a RIN account holder can protect himself or herself from being transferred RINs generated by a company with whom the RIN account holder chooses not to do business, even if indirectly. There is also a function within EMTS that allows a RIN account holder to transact unique, as opposed to generic, RINs. Unique RINs carry specific information related to the RIN generator, date of production, and batch number. As discussed above, EMTS is a closed system, and the total number of RINs associated with a particular batch of renewable fuel cannot increase or decrease even as the RINs are subdivided and transferred to multiple RIN owners. This fundamental characteristic of EMTS, together with the added features of being able to block certain RINs and trade unique ones, enhances the ability of any RIN account holder to protect their interests.

As for the commenters' concerns that they were not notified of EPA's intent to move away from the 38-digit RIN during the RFS2 rulemaking process, EPA disagrees. As discussed above, EPA introduced the concept and basic functionality of EMTS in the preamble to the RFS2 NPRM (74 FR 24904) and development of the new system commenced shortly thereafter. The process of development and testing was conducted openly and with significant stakeholder input and participation, including direct involvement by at least one of the commenters. A number of workshops, webinars and discussions were held throughout the period between publication of the NPRM and issuance of the final RFS2 regulations. In addition, presentation materials, users' guides, data schema, data templates, and tutorials were offered for interested parties to understand and provide input on system design and development. Based on this input, EPA was able to successfully deploy EMTS on July 1, 2010, concurrent with the RFS2 regulations taking effect.

We believe that the transition from the 38-digit RIN under RFS1 to the generic RIN under RFS2 allows for greater system flexibility and integrity, while maintaining the detailed RIN information necessary for regulated parties to perform independent checks on RINs they generate, receive, and transfer. In addition, we believe that the information presented throughout the rulemaking process for RFS2 adequately and transparently prepared regulated parties for the transition to EMTS. For

these reasons, we are finalizing the amendment to the introductory text to § 80.1425 as it was set forth in the May 10, 2010, direct final rule and parallel proposal (75 FR 26026, 75 FR 26049). Specifically, we are amending the text to clarify that RINs generated after July 1, 2010, may only be generated and transferred using EMTS and will not be identified by a 38-digit code. We are also amending § 80.1425(i) to simply clarify that the value of EEEEEEEE is a number representing the last gallon-RIN associated with a volume of renewable fuel.

In addition to the proposed amendments to § 80.1425, we also proposed amendments to § 80.1426(d)(1), (f)(3)(iv), and (f)(3)(v) to clarify that either the batch (BBBBB) component in the RIN or its EMTS-equivalent would be used to identify a particular batch of renewable fuel. A commenter stated that the phrase "or its equivalent in EMTS" when referring to batch-identifying information in EMTS is not clearly defined, and they expressed concern that this language would limit regulated companies from properly certifying their data and would inhibit the ability of accountants to attest to their clients' data. The commenter also requested that the language be clarified so that regulated parties can certify their data and accountants can reasonably rely on it.

Under RFS1, the BBBBB code was a unique user-specified value that could only contain numbers and had to contain five digits. The requirement to assign a "unique" batch number allowed the regulated community and EPA to determine which RINs were associated with each volume of renewable fuel, and it prevented double-counting by requiring renewable fuel producers or importers to generate one, and only one, RIN for each volume of renewable fuel. Because it could represent up to one calendar month's worth of renewable fuel production (or importation) and up to 99,999,999 gallons, RIN generators frequently generated 12 batches in a calendar year, one for each month. In EMTS, the batch number is a unique user-specified value that can contain up to 20 alphanumeric or other characters. It is a field required for RIN generation and a RIN owner may view the batch number associated with any RIN in their possession. We believe that the larger field format and ability to use letters as well as other characters to identify a batch in EMTS enhances a regulated party's ability to certify their RIN data—either as RIN generators or as RIN owners—and, in turn, allows a party's CPA to attest to the validity of such data. At the same time, we agree with

the comment that the proposed language was vague and does not adequately describe what the EMTS-equivalent of the BBBBB code is. We are therefore not finalizing the amendments to these sections and will revert to the language in the final RFS2 regulations that simply refer to a "unique batch identifier," which may be either the five-digit BBBBB component or the EMTS batch number of up to 20 characters.

C. Advanced Technologies for Renewable Fuel Pathways

The final RFS2 rule includes two corn ethanol pathways in Table 1 to § 80.1426 that require the use of one or two advanced technologies at the production facility as a prerequisite to the generation of RINs. The five advanced technologies available for this purpose are listed in Table 2 to § 80.1426. In developing this list of advanced technologies, EPA relied upon modeling that included the use of one or more advanced technologies at a base corn-ethanol plant.⁴ In all cases, the modeling assumed use of a given advanced technology across 100 percent of the ethanol production. The pathways in Table 1 and the list of advanced technologies in Table 2 represent the application of advanced technologies to 100 percent of production, consistent with the modeling they were based on.

However, neither the list in Table 2 nor the pathway descriptions in Table 1 were explicit on this percent of usage. As a result, some producers of corn ethanol assumed that any degree of implementation of advanced technologies, even to the point of de minimis GHG benefit, would be acceptable and consistent with the letter of the regulations. In the direct final rule and parallel proposal published on May 10, 2010 (75 FR 26026, 75 FR 26049), we announced a revision to Table 2 to § 80.1426 to clarify the degree to which advanced technologies must be implemented in order to represent a valid advanced technology for the generation of RINs. The announced revision specified that the advanced technologies must be applied to all production at the corn ethanol facility. In response to the direct final rule, we received adverse comments from several stakeholders objecting to the changes to Table 2 to § 80.1426. As a result, we withdrew the changes to Table 2 to § 80.1426 in a **Federal Register** notice

⁴ A base plant is one representing average energy usage and no advanced technologies. See the Regulatory Impact Analysis for the RFS2 final rule, EPA-420-R-10-006, February 2010, Section 1.5.1.3.

published on June 30, 2010 (75 FR 37733).

There were several alternative approaches to advanced technologies that were suggested by commenters, including the creation of additional pathways to add to Table 1 to § 80.1426. EPA notes at the outset that the scope of this rulemaking effort as it relates to Tables 1 and 2 to § 80.1426 is to clarify the regulatory language that identifies the pathways and specifications for advanced technologies that were modeled as part of the RFS2 rulemaking effort and that were determined to lead to an appropriate level of GHG reduction. EPA continues to evaluate additional pathways on its own initiative, and may approve the use of additional pathways, as it recently did for canola oil biodiesel.⁵ EPA has also established a petition process in § 80.1416 to allow parties seeking the addition of new pathways to Table 1 to § 80.1426 to bring those pathways to EPA's attention for evaluation. EPA urges parties seeking EPA consideration of new pathways to utilize that process. While EPA will fully evaluate any petitions for new pathways when and if they are submitted to EPA pursuant to § 80.1416, EPA also provides in this preamble some preliminary thoughts regarding some of the commenters' suggestions for new pathways, even though they are beyond the scope of this rulemaking effort.

One commenter suggested that EPA incorporate into Table 2 an energy-based metric for identifying the extent to which each advanced technology must be used at corn ethanol facilities in order to be deemed to achieve a 20 percent GHG reduction. The commenter suggested that this approach could be accomplished by basing the metric on the pathway in Table 1 to § 80.1426 that specifies no greater than 50 percent drying of distillers grains and solubles (DGS) and no advanced technologies. The premise of the comment is that any combination of advanced technologies that reduces energy usage by a specified amount will achieve the 20 percent GHG threshold. EPA rejects this approach as an oversimplification that is not currently consistent with the modeling used by EPA in developing the list of pathways and advanced technologies in Tables 1 and 2 to § 80.1426. First, EPA's modeling assumed an industry average for the various advanced technologies, and not any specific brand or type of technology. As such, the results cannot be translated into the specific equipment used and operated at a single

plant. The precision of the modeling does not support an extrapolation down to specific technology at a specific plant, which would be required under the commenter's approach.

Second, EPA modeled various scenarios, including a base plant with 100 percent drying of DGS, a base plant with 100 percent wet DGS, and various combinations of advanced technologies. In some cases use of just one specific technology such as CHP or corn oil fractionation was modeled. In other cases a base plant was modeled while progressively adding different advanced technologies. EPA's modeling by necessity did not cover the universe of all possible combinations of advanced technologies, and as such does not allow for a precise quantification of each advanced technology either by itself or in combination with a second advanced technology. The modeling does provide clear indication that (1) There can be interactive effects between pairs of advanced technologies, (2) advanced technologies can have complex impacts, and the reductions in GHG emissions are not all based on just a simple linear reduction in energy use, and (3) different combinations of advanced technologies are likely to lead to a range of results across the various combinations. EPA's conclusion in the final RFS2 rulemaking was that the GHG benefits of the use of advanced technologies as specified in Tables 1 and 2 to § 80.1426 would in all cases allow at least a limited degree of GHG reduction beyond the 20 percent threshold, with the exact degree of reduction dependent on the specific combination of advanced technologies and drying of DGS. As a result, the modeling performed by EPA to date does not support specifying a simple formula that could allow usage of advanced technologies as a function of measured reductions in energy usage. Thus EPA believes there is not a technical basis at this time for the approach suggested by the commenter.

We also received a suggestion that the table of advanced technologies be modified to include the option of "energy efficient plant design" that could be achieved through documented low energy use. In this approach, EPA would establish a level of energy input per gallon of product that would reflect achievement of the 20 percent GHG reduction threshold, and industry would be free to use any method to achieve that required energy utilization standard. Records of fuel and electricity use in the facility would be submitted to demonstrate attainment of the standard. This suggestion is clearly beyond the scope of this rulemaking

effort, which is limited to clarifying the regulatory language related to the modeling and analyses that EPA conducted as part of the RFS2 rulemaking. Although the commenter suggested that the energy utilization standard could be set using existing modeling tied to an existing pathway in Table 1 to § 80.1426, EPA believes that this would not be technically justified for the same reasons, described above, that it would not be appropriate to use this metric to establish specifications regarding use of advanced technologies. Thus, the suggested approach would likely require new analyses to identify an appropriate energy utilization standard that would take into account all possible direct and indirect effects associated with multiple possible permutations of facility technology and practice. It could also require additional recordkeeping and reporting requirements as well as new formulas or tabulated values in the regulations for converting energy use into GHG reductions. All such changes would entail dramatically different approaches to the identification of pathways that achieve the necessary amount of GHG reduction to qualify under the Act than were finalized in the RFS2 rulemaking. Therefore, we did not propose and are not adopting the commenter's suggested approach in today's rulemaking. Parties advocating this approach are encouraged to utilize the petition process in § 80.1416 to request that EPA further evaluate this concept and, in the context of their petition, to address the concerns that EPA noted above.

A number of commenters suggested that application of advanced technologies to 100 percent of the production at a corn ethanol plant was not feasible. One commenter pointed out that common and legitimate downtime for an advanced technology, even if it is of a very short duration, could preclude a corn ethanol producer from generating any RINs if Table 2 to § 80.1426 requires application of an advanced technology to all production at a facility. Another commenter suggested that advanced technologies be required to be applied to 90 percent of the production at a corn ethanol facility, instead of 100 percent. In response, we do recognize that there may be occasions in which an advanced technology must be halted or bypassed for a short time for maintenance, repair, or other reasons. To determine whether the regulations could be modified to address this concern, we reviewed the original lifecycle GHG modeling for corn ethanol plants that was done for the RFS2 final rule. The modeling

⁵ 75 FR 59622, September 28, 2010.

indicates that use of the advanced technologies as specified should in all cases provide a minimum margin of compliance beyond the 20 percent GHG reduction threshold, and in some cases a larger margin. Thus a small reduction in the application of advanced technologies should still ensure that the 20 percent GHG threshold is met. EPA recognizes that this is a question of degree and is basing this on expert judgment and not specific new modeling. As such, no more than a small reduction in percent usage is warranted absent further modeling. As a result, we have modified the regulatory requirements so that advanced technologies must be applied to at least 90 percent of the production at a corn ethanol facility. Moreover, we are requiring that compliance with this 90 percent criterion be made over the course of a calendar year, consistent with the approach to the maximum allowable fraction of DGS that can be dried under certain corn ethanol pathways in Table 1 to § 80.1426. This approach relies on judgment based on the lifecycle modeling that was previously performed, as described above, to provide some flexibility for downtime of an advanced technology while still requiring the requisite level of GHG reduction.

Since compliance with the advanced technologies in Table 2 to § 80.1426 is determined on an annual basis, any RINs that are generated based upon the use of one or more of these technologies could be considered invalid if the technologies are not employed in accordance with the specifications in Table 2, including any requirement based upon use of these technologies for 90 percent of production on a calendar year basis. We note, however, that in determining an appropriate remedy for a violation arising from a renewable fuel producer's failure to properly employ advanced technologies in accordance with the specifications in Table 2 to § 80.1426, EPA may consider a number of factors, including the volume of fuel for which RINs were generated that was produced without the advanced technologies, the reasons that the advanced technologies were not employed, and efforts taken by the renewable fuel producer to remedy the harm caused by the violation.

Another suggested change would have allowed GHG reductions for ethanol volume that is grandfathered under § 80.1403 to be used as a credit for ethanol volume that has not been grandfathered. Such an approach could mean that all the GHG reductions associated with applying a given advanced technology to an entire corn

ethanol plant could be deemed to apply to only the volume that is in excess of the plant's grandfathered baseline volume. We do not believe that this would be appropriate. Not only did we not propose such an approach to compliance with the 20 percent GHG reduction threshold, but it would amount to transferring GHG reductions from grandfathered volume to non-grandfathered volume. In so doing, a corn ethanol producer could claim that its non-grandfathered ethanol met the 20 percent GHG reduction threshold even if the plant as a whole did not and there was no discernable difference in plant operations between the grandfathered and non-grandfathered volume. The regulations do not allow GHG reduction credits to be assumed for grandfathered volume and then used to offset the GHG emissions from the non-grandfathered portion of the facility's production. Non-grandfathered production must be assessed separately.

Some commenters raised a concern that the proposed language requiring application of advanced technologies to "all" production at a facility necessarily required that the advanced technologies be applied to volumes that are grandfathered and are not subject to the 20 percent GHG reduction threshold for renewable fuel. This was not our intention. Advanced technologies are not required for volumes that are grandfathered according to § 80.1403. Thus, we have modified the regulations to clarify that Tables 1 and 2 to § 80.1426 do not apply to volumes of fuel for which RINs are generated pursuant to § 80.1426(f)(6).

With regard to corn oil extraction, we believe that the description in Table 2 to § 80.1426 requires additional modification to more accurately reflect the lifecycle modeling that was conducted. For instance, some commenters pointed out that the terms "thin stillage" and "distillers grains and solubles" do not accurately describe the byproduct categories to which corn oil extraction can be applied. More appropriate might be thin stillage and wet cake, or alternatively just the whole stillage which precedes the derivatives thin stillage and wet cake. Our lifecycle modeling assumed that corn oil extraction was applied to all the byproducts that are included in whole stillage. However, after further consideration, we believe that a more straightforward approach to specifying the required application of corn oil extraction in the regulations would be to identify the amount of oil that must be extracted rather than the amount of whole stillage to which the technology must be applied. This approach is

consistent with a suggestion from one commenter and will result in the same GHG reductions as our proposed approach. This approach will also allow corn-ethanol producers utilizing the corn oil extraction advanced technology to apply it to particular byproducts as they see fit, providing only that the requisite quantity of oil is extracted.

The lifecycle modeling that led us to include corn oil fractionation in Table 2 to § 80.1426 assumed an oil extraction rate of 1.48 pounds of oil per bushel of corn. As described above, we have determined that a 10 percent reduction in the application of this advanced technology can be accommodated while still ensuring that the 20 percent GHG threshold has been met. An oil extraction rate of 1.33 pounds per bushel represents 90 percent of the value we assumed in developing Table 2 to § 80.1426. Thus, in today's rule we are modifying the description of corn oil extraction to require a minimum of 1.33 pounds of oil to be extracted from whole stillage or its derivatives per bushel of corn that is processed into ethanol. This oil extraction rate is substantially less than the total amount of oils contained in byproducts from corn ethanol processing. As a result, we believe this approach will address concerns from some commenters that the proposed language would have required all oil to be removed from distillers grains, potentially creating an unmarketable product. Although one commenter suggested a corn oil extraction rate of 1.0 pound per bushel, we do not believe that this level of implementation of this advanced technology would ensure that the 20 percent GHG reduction threshold has been met.

With regard to combined heat and power (CHP), one commenter expressed concern that the application of CHP to all of the production at a corn ethanol facility could require the installation of new boilers sized to produce electricity. The commenter argued that such actions were unnecessary and would make CHP commercially unviable. However, the identification of advanced technologies in Table 2 to § 80.1426 and the calculation of their required usage rate is designed to ensure that the 20 percent GHG reduction threshold can be met. The costs of implementation of CHP were not considered in determining the technical issue of the GHG reduction threshold determination. However, we have reviewed the modeling conducted as part of the RFS2 rulemaking and have determined that application of CHP to 90 percent of production at a corn ethanol facility will achieve a 20 percent GHG reduction, and we have

modified Table 2 to § 80.1426 accordingly.

In conjunction with the modifications to Table 2 to § 80.1426 as described above, we are finalizing additional recordkeeping and attest engagement requirements to help ensure that RINs are properly generated for corn ethanol produced at facilities that employ advanced technologies listed in Table 2 to § 80.1426. Specifically, we are finalizing a requirement at § 80.1454(b)(3)(xi) that, for RINs generated for ethanol produced from corn starch at a facility using advanced technologies in accordance with the requirements in Tables 1 and 2 to § 80.1426, producers must maintain documentation to demonstrate that advanced technologies used to qualify such ethanol for RIN generation were employed at least 90 percent of the time on a calendar year basis. In addition, we are finalizing an amendment to the attest engagement procedures for renewable fuel producers at § 80.1464(b)(1)(iii) that, for RINs generated for ethanol produced from corn starch at a facility that used advanced technologies in accordance with the requirements in Tables 1 and 2 to § 80.1426, will require verification that the advanced technologies used to qualify such ethanol for RIN generation were employed at least 90 percent of the time on a calendar year basis. We believe that these requirements are natural outgrowths of the final changes being made to Table 2 to § 80.1426 in response to comments received on our proposed amendments to this section, and that these additional recordkeeping and attestation requirements are necessary to ensure compliance with and enforceability of this aspect of the RFS program.

D. Use of Biogas from a Dedicated Pipeline at Renewable Fuel Production Facilities

EPA proposed to amend 40 CFR 80.1426(f)(12) to clarify the requirements that must be met in order for gas used for process heat at a renewable fuel production facility to be considered biogas for purposes of the “production process requirements” column of Table 1 to § 80.1426. In order to differentiate the requirements associated with biogas transported via a dedicated pipeline versus those associated with biogas transported via a common carrier pipeline, we proposed to subdivide the requirements under § 80.1426(f)(12). Thus revisions to § 80.1426(f)(12)(i) were proposed to describe the requirements for biogas transported via a dedicated pipeline, and revisions to § 80.1426(f)(12)(ii) were

proposed to describe the requirements for biogas transported via a common carrier pipeline. In drafting the proposed revised regulations applicable to biogas in a dedicated pipeline in § 80.1426(f)(12)(i), we mistakenly included language in paragraph § 80.1426(f)(12)(i)(D) that referred to biogas placed in a common carrier pipeline, and proposed requiring that such pipeline ultimately serve the renewable fuel producer’s facility. A commenter rightfully expressed confusion over the proposed amendment at § 80.1426(f)(12)(i), since § 80.1426(f)(12)(ii) is the appropriate section for references to biogas in a common carrier pipeline. We received no other comments on our proposed changes to § 80.1426(f)(12).

EPA agrees that the amendment at § 80.1426(f)(12)(i)(D) was proposed in error and therefore is finalizing all proposed amendments to § 80.1426(f)(12), with the exception of § 80.1426(f)(12)(i)(D). We considered retaining the provision by deleting the words “common carrier” that modify the reference to “pipeline.” However, § 80.1426(f)(12)(i) already specifies that the biogas discussed in this section is “directly transported to the facility.” Therefore, a modified § 80.1426(f)(12)(i)(D) is not necessary, and we have simply deleted the provision. We also noted a typographical error and some potentially confusing text in § 80.1426(f)(12)(ii)(C) and have taken this opportunity to make the appropriate corrections.

E. Time Limits for Reporting Transactions in EMTS

The final RFS2 regulations require any RIN generator to submit, via their account in the EPA Moderated Transaction System (EMTS), information about any batch of renewable fuel and the RINs generated for it within five days of the production or importation of the batch (*see* § 80.1452(b) at 75 FR 14887). Likewise, the final RFS2 regulations also require any party that engages in RIN transactions to submit, via their EMTS account, information about the transaction within five business days (*see* § 80.1452(c) at 75 FR 14887). These transactional time limits were finalized in order to strike a balance between the need for EMTS to be a “real time” system and the need for some amount of flexibility to accommodate existing business practices related to conducting renewable fuel and RIN transactions.

After the RFS2 regulations were finalized, EPA received numerous inquiries from regulated parties about

whether the five day limit applied to both the transactional buyer and seller together, or whether each seller and each buyer had five days to perform their respective actions in EMTS. We therefore proposed to amend § 80.1452(b) and (c) to clarify our original intent with respect to when RIN information needed to be submitted to EMTS. Specifically, we proposed to revise § 80.1452(b) to clarify that RIN information must be entered into EMTS within five business days of RINs being assigned to a batch of renewable fuel and to clarify the information required to be submitted via EMTS for each such batch. We also proposed to revise § 80.1452(c) to clarify that transactions involving RINs generated on or after July 1, 2010, must be conducted via EMTS within five business days of a reportable event, to clarify the meaning of the term “reportable event,” and to clarify the information required to be submitted via EMTS for each transaction involving RINs generated on or after July 1, 2010.

We received one adverse comment on the proposed amendatory language to § 80.1452(b) and (c) that expressed concern over a buyer’s inability to check the accuracy and validity of RINs that may be received via a renewable fuel product transfer document (PTD) and an inability to prevent RINs with errors from being traded further. As discussed above, in addition to the adverse comment, we received feedback from regulated parties prior to the publication of the direct final and parallel proposed rules on May 10, 2010 (75 FR 26026, 75 FR 26049), that the five business day requirement for both parties may be acceptable on the seller’s side of the transaction, but that it can prove difficult for a buyer to confirm or send transactional information within five days of the PTD date. This difficulty may be due to the fact that the PTD may be generated and sent when the fuel is shipped, and the shipping may take longer than a week, or because all RINs may be aggregated on one PTD that is sent weekly or monthly along with renewable fuel.

Based on the comment received as part of this rulemaking and the additional feedback received prior to this rulemaking, we are finalizing an amendment to § 80.1452(c) that will increase the number of days a buyer has to submit transactional information to EMTS. Specifically, a buyer will have ten business days from the date on the PTD to submit information about a transaction, including accepting a transaction initiated by a seller, in EMTS. The seller will still be required to submit information within five

business days of the date on the PTD. Thus the buyer will have a minimum of five days, and a maximum of up to ten days if the seller acts on the same date as the date on the PTD, to enter the required information into EMTS.

Although the comment makes reference both to 80.1452(b) and (c), we believe that the amendatory language to § 80.1452(c) alleviates the problem cited by the commenter and therefore we are finalizing the amendment to 80.1452(b), to allow up to five business days after RIN assignment for a RIN generator to submit RIN information for a batch of renewable fuel to EMTS, as proposed at 75 FR 26049 (May 10, 2010). We also noted inconsistency and some potentially confusing text at § 80.1452(b)(1), (b)(2), (b)(4), and (b)(5) and have taken this opportunity to make the appropriate corrections.

III. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735, October 4, 1993) the Agency must determine whether the regulatory action is “significant” and therefore subject to OMB review and the requirements of the Executive Order. The Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

It has been determined that this action is not a “significant regulatory action” under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The corrections, clarifications, and modifications to the final RFS2 regulations contained in this rule are within the scope of the information

collection requirements submitted to the Office of Management and Budget (OMB) for the final RFS2 regulations. OMB has previously approved the information collection requirements contained in the existing regulations at 40 CFR part 80, subpart M under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0640. The OMB control numbers for EPA’s regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today’s rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration’s (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities that were not already considered under the final RFS2 regulations, as it makes relatively minor corrections and modifications to those regulations.

D. Unfunded Mandates Reform Act

This rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. We have determined that this action will not result in expenditures of \$100 million or more for the above parties and thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory

requirements that might significantly or uniquely affect small governments. It only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS2 regulations.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action only applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers and makes relatively minor corrections and modifications to the RFS2 regulations. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). It applies to gasoline, diesel, and renewable fuel producers, importers, distributors and marketers. This action makes relatively minor corrections and modifications to the RFS regulations, and does not impose any enforceable duties on communities of Indian tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This rule is not subject to Executive Order 13211 (66 FR 18355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.

Executive Order (EO) 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. These technical amendments do not relax the control measures on sources regulated by the RFS regulations and therefore will not cause emissions increases from these sources.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the

Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

L. Clean Air Act Section 307(d)

This rule is subject to Section 307(d) of the CAA. Section 307(d)(7)(B) provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for the EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to the EPA should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Director of the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

List of Subjects in 40 CFR Part 80

Environmental protection, Fuel additives, Gasoline, Imports, Motor vehicle pollution, Reporting and recordkeeping requirements.

Dated: December 14, 2010.

Lisa P. Jackson,
Administrator.

■ For the reasons set forth in the preamble, 40 CFR part 80 is amended as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

■ 1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7542, 7545, and 7601(a).

■ 2. Section 80.1401 is amended by adding definitions of "Actual peak capacity", "Baseline volume", and "Permitted capacity", in alphabetical order to read as follows:

§ 80.1401 Definitions.

* * * * *

Actual peak capacity means 105% of the maximum annual volume of renewable fuels produced from a specific renewable fuel production facility on a calendar year basis.

(1) For facilities that commenced construction prior to December 19, 2007, the actual peak capacity is based on the last five calendar years prior to 2008, unless no such production exists, in which case actual peak capacity is based on any calendar year after startup during the first three years of operation.

(2) For facilities that commenced construction after December 19, 2007 and before January 1, 2010 that are fired with natural gas, biomass, or a combination thereof, the actual peak capacity is based on any calendar year after startup during the first three years of operation.

(3) For all other facilities not included above, the actual peak capacity is based on the last five calendar years prior to the year in which the owner or operator registers the facility under the provisions of § 80.1450, unless no such production exists, in which case actual peak capacity is based on any calendar year after startup during the first three years of operation.

* * * * *

Baseline volume means the permitted capacity or, if permitted capacity cannot be determined, the actual peak capacity of a specific renewable fuel production facility on a calendar year basis.

* * * * *

Permitted capacity means 105% of the maximum permissible volume output of renewable fuel that is allowed under operating conditions specified in the most restrictive of all applicable preconstruction, construction and operating permits issued by regulatory authorities (including local, regional, state or a foreign equivalent of a state, and federal permits, or permits issued by foreign governmental agencies) that govern the construction and/or operation of the renewable fuel facility, based on an annual volume output on a calendar year basis. If the permit specifies maximum rated volume output on an hourly basis, then annual volume output is determined by multiplying the hourly output by 8,322 hours per year.

(1) For facilities that commenced construction prior to December 19, 2007, the permitted capacity is based on

permits issued or revised no later than December 19, 2007.

(2) For facilities that commenced construction after December 19, 2007 and before January 1, 2010 that are fired with natural gas, biomass, or a combination thereof, the permitted capacity is based on permits issued or revised no later than December 31, 2009.

(3) For facilities other than those described in paragraphs (1) and (2) of this definition, permitted capacity is based on the most recent applicable permits.

* * * * *

■ 3. Section 80.1403 is amended by revising paragraph (a) to read as follows:

§ 80.1403 Which fuels are not subject to the 20% GHG thresholds?

(a) For purposes of this section, the following definitions apply:

(1) *Commence construction*, as applied to facilities that produce renewable fuel, means that:

(i) The owner or operator has all necessary preconstruction approvals or permits (as defined at 40 CFR 52.21(b)(10)), and has satisfied either of the following:

(A) Begun, or caused to begin, a continuous program of actual construction on-site (as defined in 40 CFR 52.21(b)(11)).

(B) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the facility.

(ii) For multi-phased projects, the commencement of construction of one phase does not constitute commencement of construction of any later phase, unless each phase is mutually dependent for physical and chemical reasons only.

(2) [Reserved]

* * * * *

■ 4. Section 80.1425 is amended by revising the introductory text and paragraph (i) to read as follows:

§ 80.1425 Renewable Identification Numbers (RINs).

RINs generated on or after July 1, 2010 shall not be generated as a 38-digit code, but shall be identified by the information specified in paragraphs (a) through (i) of this section and introduced into EMTS as data elements during the generation of RINs pursuant to § 80.1452(b). For RINs generated prior to July 1, 2010, each RIN is a 38-digit code of the following form:

KYYYYCCCCFFFB BBBBRRD
SSSSSSSEEEEEEE

* * * * *

(i) EEEEEEEE is a number representing the last gallon-RIN associated with a volume of renewable fuel.

■ 5. Section 80.1426 is amended as follows:

■ a. By revising introductory text to paragraph (f)(1).

■ b. By revising Table 2 to § 80.1426.

■ c. By revising paragraph (f)(12).

§ 80.1426 How are RINs generated and assigned to batches of renewable fuel by renewable fuel producers or importers?

* * * * *

(f) * * *

(1) *Applicable pathways*. D codes shall be used in RINs generated by producers or importers of renewable fuel according to the pathways listed in Table 1 to this section, subparagraph 6 of this section, or as approved by the Administrator. In choosing an appropriate D code, producers and importers may disregard any incidental, de minimis feedstock contaminants that are impractical to remove and are related to customary feedstock production and transport. Tables 1 and 2 to this section do not apply to, and impose no requirements with respect to, volumes of fuel for which RINs are generated pursuant to subparagraph 6 of this section.

* * * * *

TABLE 2 TO § 80.1426—ADVANCED TECHNOLOGIES

Corn oil fractionation that is applied to at least 90% of the corn used to produce ethanol on a calendar year basis.

Corn oil extraction that is applied to the whole stillage and/or derivatives of whole stillage and results in recovery of corn oil at an annual average rate equal to or greater than 1.33 pounds oil per bushel of corn processed into ethanol.

Membrane separation in which at least 90% of ethanol dehydration is carried out using a hydrophilic membrane on a calendar year basis.

Raw starch hydrolysis that is used for at least 90% of starch hydrolysis used to produce ethanol instead of hydrolysis using a traditional high heat cooking process, calculated on a calendar year basis.

Combined heat and power such that, on a calendar year basis, at least 90% of the thermal energy associated with ethanol production (including thermal energy produced at the facility and that which is derived from an off-site waste heat supplier), exclusive of any thermal energy used for the drying of distillers grains and solubles, is used to produce electricity prior to being used to meet the process heat requirements of the facility.

* * * * *

(12) For purposes of Table 1 to this section, process heat produced from combustion of gas at a renewable fuel facility is considered derived from biomass if the gas is biogas.

(i) For biogas directly transported to the facility without being placed in a commercial distribution system, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(ii) For biogas that has been gathered, processed and injected into a common carrier pipeline, all of the following conditions must be met:

(A) The producer has entered into a written contract for the procurement of a specific volume of biogas with a specific heat content.

(B) The volume of biogas was sold to the renewable fuel production facility, and to no other facility.

(C) The volume of biogas that is withdrawn from the pipeline is withdrawn in a manner and at a time consistent with the transport of fuel between the injection and withdrawal points.

(D) The volume and heat content of biogas injected into the pipeline and the volume of gas used as process heat are measured by continuous metering.

(E) The common carrier pipeline into which the biogas is placed ultimately

serves the producer's renewable fuel facility.

(iii) The process heat produced from combustion of gas at a renewable fuel facility described in paragraph (f)(12)(i) of this section shall not be considered derived from biomass if any other party relied upon the contracted volume of biogas for the creation of RINs.

* * * * *

6. Section 80.1451 is amended by revising paragraph (b)(1)(ii)(M) to read as follows:

§ 80.1451 What are the reporting requirements under the RFS program?

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(M) The type of co-products produced with each batch.

* * * * *

■ 7. Section 80.1452 is amended as follows:

■ a. By revising paragraphs (b) introductory text, (b)(1), (b)(2), (b)(4), (b)(5), (b)(6), (b)(9), (b)(13), and (b)(15).

■ b. By revising paragraphs (c) introductory text, (c)(4), (c)(5), and (c)(7).

§ 80.1452 What are the requirements related to the EPA Moderated Transaction System (EMTS)?

* * * * *

(b) Starting July 1, 2010, each time a domestic or foreign producer or importer of renewable fuel assigns RINs to a batch of renewable fuel pursuant to § 80.1426(e), all the following information must be submitted to EPA via the submitting party's EMTS account within five (5) business days of the date of RIN assignment.

(1) The name of the renewable fuel producer or importer.

(2) The EPA company registration number of the renewable fuel or foreign ethanol producer, as applicable.

* * * * *

(4) The EPA facility registration number of the renewable fuel or foreign ethanol producer, as applicable.

(5) The importer's EPA facility registration number if applicable.

(6) The D code of RINs generated for the batch.

* * * * *

(9) The fuel type of the batch.

* * * * *

(13) The type and quantity of feedstock(s) used for the batch.

* * * * *

(15) The type and quantity of co-products produced with the batch of renewable fuel.

* * * * *

(c) Starting July 1, 2010, each time any party sells, separates, or retires RINs generated on or after July 1, 2010, all the following information must be submitted to EPA via the submitting party's EMTS account within five (5) business days of the reportable event. Starting July 1, 2010, each time any party purchases RINs generated on or after July 1, 2010, all the following information must be submitted to EPA via the submitting party's EMTS account within ten (10) business days of the reportable event. The reportable event for a RIN purchase or sale occurs on the date of transfer per § 80.1453(a)(4). The reportable event for a RIN separation or retirement occurs on the date of separation or retirement as described in § 80.1429.

* * * * *

(4) The RIN status (Assigned or Separated).

(5) The D code of the RINs.

* * * * *

(7) The date of transfer per § 80.1453(a)(4), if applicable.

* * * * *

■ 8. Section 80.1454 is amended by revising paragraph (b)(3)(xi) and adding a new paragraph (b)(3)(xii).

§ 80.1454 What are the recordkeeping requirements under the RFS program?

* * * * *

(b) * * *

(3) * * *

(xi) For RINs generated for ethanol produced from corn starch at a facility using a pathway in Table 1 to § 80.1426 that requires the use of one or more of the advanced technologies listed in Table 2 to § 80.1426, documentation to demonstrate that employment of the required advanced technology or technologies was conducted in accordance with the specifications in Tables 1 and 2 to § 80.1426, including any requirement for application to 90% of the production on a calendar year basis.

(xii) All commercial documents and additional information related to details of RIN generation.

* * * * *

■ 9. Section 80.1464 is amended by revising paragraph (b)(1)(iii) to read as follows:

§ 80.1464 What are the attest engagement requirements under the RFS program?

* * * * *

(b) * * *

(1) * * *

(iii) Verify that the proper number of RINs were generated and assigned pursuant to the requirements of § 80.1426 for each batch of renewable

fuel produced or imported. For RINs generated for ethanol produced from corn starch at a facility using a pathway in Table 1 to § 80.1426 that requires the use of one or more of the advanced technologies listed in Table 2 to § 80.1426, verify that the required advanced technology or technologies were employed in accordance with the specifications in Tables 1 and 2 to § 80.1426, including any requirement for application to 90% of the production on a calendar year basis.

* * * * *

[FR Doc. 2010-31910 Filed 12-20-10; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA-2010-0114; Notice 2]

RIN 2127-AK78

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final Rule.

SUMMARY: This document increases the maximum civil penalty amounts for related series of violations of the National Traffic and Motor Vehicle Safety Act, as amended (Vehicle Safety Act) and increases the liability for a violation of odometer disclosure or other odometer requirements with intent to defraud. This action is taken pursuant to the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, which requires NHTSA to review and, as warranted, adjust penalties based on inflation at least every four years.

DATES: This final rule is effective January 20, 2011.

ADDRESSES: Petitions for reconsideration should refer to the docket number and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Fourth Floor, Washington, DC 20590, with a copy to the DOT docket. Copies to the docket may be submitted electronically [identified by DOT Docket ID Number NHTSA-2010-0114] by visiting the following Web site:

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Privacy Act: Anyone is able to search the electronic form of all comments

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477, 19477–78).

FOR FURTHER INFORMATION CONTACT: Jessica Lang, Office of Chief Counsel, NHTSA, telephone (202) 366–5902, facsimile (202) 366–3820, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Background

In order to preserve the remedial impact of civil penalties and to foster compliance with the law, the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (28 U.S.C. 2461, Notes, Pub. L. 101–410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) (referred to collectively as the “Adjustment Act” or, in context, the “Act”), requires us and other Federal agencies to adjust civil penalties for inflation. Under the Adjustment Act, following an initial adjustment that was capped by the Act, these agencies must make further adjustments, as warranted, to the amounts of penalties in statutes they administer at least once every four years.

NHTSA's initial adjustment of civil penalties under the Adjustment Act was published on February 4, 1997. 62 FR 5167. At that time, we codified the penalties under statutes administered by NHTSA, as adjusted, in 49 CFR Part 578, Civil Penalties. Since that time, we have adjusted available penalties on a number of occasions. See 75 FR 49879, 49880 (Aug. 16, 2010).

On August 16, 2010, the Agency published a Notice of Proposed Rulemaking (NPRM) entitled “Civil Penalties” which proposed the adjustment for inflation of civil penalties for related series of violations of the Vehicle Safety Act and the liability for a violation of the odometer law with intent to defraud. 75 FR 49879. The Agency received no comments to this NPRM.

Under the Adjustment Act, we now adjust the civil penalties available for related series of violations of the Vehicle Safety Act and an amount for a violation of odometer disclosure or other odometer requirements with intent to defraud.

Method of Calculation—Adjustments

Under the Adjustment Act, we first calculate the inflation adjustment for each applicable civil penalty by arithmetically increasing the maximum civil penalty amount per violation by a cost-of-living adjustment. Section 5(b) of the Adjustment Act defines the “cost-of-living” adjustment as:

The percentage (if any) for each civil monetary penalty by which—

(1) The Consumer Price Index for the month of June of the calendar year preceding the adjustment exceeds

(2) The Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

Because the adjustment is intended to be effective before December 31, 2010, the “Consumer Price Index [CPI] for the month of June of the calendar year preceding the adjustment” is the CPI for June 2009. This figure, based on the Adjustment Act's requirement of using the CPI “for all-urban consumers published by the Department of Labor,” is 646.1.¹

NHTSA now adjusts the maximum penalty for a related series of violations of the Vehicle Safety Act, in general, as well as those for violations of 49 U.S.C. 30166 or a regulation thereunder. See 49 U.S.C. 30165(a)(1) and (a)(3). These amounts were last adjusted in 2006 (CPI = 607.8). 71 FR 28279, 28281–82. Accordingly, the factor that we use to calculate these increases is 1.06 (646.1/607.8).

NHTSA also now adjusts the odometer law's maximum penalty for intent to defraud. See 49 U.S.C. 32709(d), 32710(a). This amount was last adjusted in 1999 (CPI = 497.9). 64 FR 37876, 37878. Accordingly, the factor that we use to calculate this increase is 1.30 (646.1/497.9).

Using these inflation factors, increases above the current maximum penalty levels are calculated and are then subject to a specific rounding formula set forth in Section 5(a) of the Adjustment Act. 28 U.S.C. 2461, Notes. Under that formula:

Any increase shall be rounded to the nearest

(1) Multiple of \$10 in the case of penalties less than or equal to \$100;

(2) Multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) Multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) Multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) Multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) Multiple of \$25,000 in the case of penalties greater than \$200,000.

Amendments to Maximum Penalties

Maximum Penalty (a Related Series of Violations) Under the Motor Vehicle Safety Act in General (49 CFR 578.6(a)(1)) and Section 30166 (49 CFR 578.6(a)(3))

The maximum civil penalty for a related series of violations under the Vehicle Safety Act or a regulation issued thereunder is \$16,375,000 as specified in 49 CFR 578.6(a)(1). The underlying statutory provision is 49 U.S.C. 30165(a)(1). The maximum civil penalty for a related series of violations of 49 U.S.C. 30166 or a regulation issued thereunder is \$16,375,000 as specified in 49 CFR 578.6(a)(3). The underlying statutory provision is 49 U.S.C. 30165(a)(3).

Applying the appropriate inflation factor (1.06) raises each of the \$16,375,000 penalties to \$17,357,500, an increase of \$982,500. Under the rounding formula, any increase in a penalty's amount shall be rounded to the nearest \$25,000 in the case of penalties greater than \$200,000. Accordingly, today we amend Section 578.6(a)(1) and Section 578.6(a)(3) of Title 49 Code of Federal Regulations to increase the maximum civil penalty for a related series of violations from \$16,375,000 to \$17,350,000.

Amount for Violation With Intent To Defraud Under the Odometer Standards Provision, 49 U.S.C. Chapter 327 (49 CFR § 578.6(f)(2))

The liability for a violation of the odometer statute, 49 U.S.C. Chapter 327, or a regulation or order, with intent to defraud is three times the actual damages or \$2,000, whichever is greater, as specified in 49 CFR 578.6(f)(2). The underlying statutory provisions are 49 U.S.C. 32709(d)(1) and 49 U.S.C. 32710(a). Applying the appropriate inflation factor (1.30) raises the \$2,000 figure to \$2,600, an increase of \$600. Under the rounding formula, any increase in a penalty's amount shall be rounded to the nearest multiple of \$1,000 in the case of penalties greater

¹ Individuals interested in deriving the CPI figures used by the agency may visit the Department of Labor's Consumer Price Index Home Page at <http://www.bls.gov/cpi/home.htm>. Scroll down to “Most Requested Statistics” and select the “All Urban Consumers (Current Series)” option, select the “U.S. ALL ITEMS 1967=100—CUUR0000AA0” box, and click on the “Retrieve Data” button.

than \$1,000, but less than or equal to \$10,000. In this case, the increase would be \$1,000. Accordingly, today we amend Section 578.6(f)(2) to increase the amount for a violation of the statute or a regulation prescribed or order issued thereunder with intent to defraud from three times the actual damages or \$2,000, whichever is greater, to three times the actual damages or \$3,000, whichever is greater.

Rulemaking Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

We have considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866, "Regulatory Planning and Review." This action is limited to the adoption of adjustments of civil penalties under statutes that the agency enforces, and has been determined to be not "significant" under the Department of Transportation's regulatory policies and procedures.

Regulatory Flexibility Act

We have also considered the impacts of this notice under the Regulatory Flexibility Act. I certify this final rule will not have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b).

The Small Business Administration (SBA) regulations define a small business in part as a business entity "which operates primarily within the United States." 13 CFR 121.105(a). SBA's size standards were previously organized according to Standard Industrial Classification (SIC) Codes. SIC Code 336211 "Motor Vehicle Body Manufacturing" applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System (NAICS), Subsector 336—Transportation Equipment Manufacturing, which provides a small business size standard of 1,000 employees or fewer for automobile manufacturing businesses. Other motor vehicle-related industries have lower size requirements that range between 500 and 750 employees.

Many small businesses are subject to the penalty provisions of Title 49 U.S.C. Chapters 301 (motor vehicles, in general and Section 30166) and 327 (odometer requirements); therefore, small businesses may be affected by this final rule. Entities that are potentially

affected vary by statute and may include manufacturers of motor vehicles and motor vehicle equipment, sellers of vehicles and equipment, repair shops and others.

The adjustment to penalty amounts in 49 U.S.C. 30165(a)(1), relating to motor vehicle safety, in general, and in 49 U.S.C. 30165 (a)(3), relating to Section 30166, potentially impacts numerous entities including manufacturers, sellers and importers of motor vehicles and motor vehicle equipment. We do not have data on how many other entities within the ambit of 49 U.S.C. 30165(a)(1) and (a)(3) are small businesses, but the number is considerable.

The adjustment to penalty amounts in Chapter 327 relating to odometer requirements potentially impacts a number of small businesses including repair businesses, used car dealers, businesses that are lessors of vehicles, auction houses, and entities making devices that could change an odometer's mileage. Although we do not have information on how many of these entities are small businesses, we believe a large percentage are small businesses.

As noted throughout this preamble, this final rule on civil penalties increases the maximum penalty amounts that the agency could obtain for certain violations of provisions related to motor vehicle safety in general and for 49 U.S.C. 30166 violations, including regulations thereunder. This final rule does not set the amount of penalties for any particular series of violations under the Vehicle Safety Act. Under Vehicle Safety Act, the agency takes into account the size of a business when determining the appropriate penalty in an individual case. See 49 U.S.C. 30165(c).

Today's penalty adjustments would not affect our civil penalty policy under the Small Business Regulatory Enforcement Fairness Act (SBREFA). See 62 FR 37115 (July 10, 1997). As a matter of policy, we intend to continue to consider the appropriateness of the penalty amount to the size of the business charged. In these matters, there would not be a significant economic impact on small businesses.

The amount in civil actions by state attorneys general and private persons for violations of the odometer statute or a regulation prescribed or order issued under that statute is set by statute. It requires intent to defraud, and is three times actual damages or, as set today, \$3,000, whichever is greater. The statute also provides for costs and attorneys fees. 49 U.S.C. 32710. Thus, the \$3,000 figure is but one aspect of costs that a

violation may face. The vast majority of civil actions settle.

Small organizations and governmental jurisdictions would not be significantly affected as the price of motor vehicles and equipment ought not to change as the result of this final rule. As explained above, this action is limited to the adoption of a statutory directive, and has been determined to be not "significant" under the Department of Transportation's regulatory policies and procedures.

Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Section 6 of Executive Order 13132, the agency may not issue a regulation with Federalism implications that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the regulation.

This final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, the requirements of Section 6 of the Executive Order do not apply.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104-4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually. Because this final rule will not have a \$100 million effect, no Unfunded Mandates assessment will be prepared.

Executive Order 12778 (Civil Justice Reform)

This final rule does not have a retroactive or preemptive effect. Judicial review of a rule based on this proposal may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, we state that there are no requirements for information collection associated with this rulemaking action.

List of Subjects in 49 CFR Part 578

Motor vehicle safety, Penalties.

■ In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for part 578 continues to read as follows:

Authority: Pub. L. 101–410, Pub. L. 104–134, 49 U.S.C. 30165, 30170, 30505, 32304A,

32308, 32309, 32507, 32709, 32710, 32912, and 33115 as amended; delegation of authority at 49 CFR 1.50.

■ 2. Section 578.6, paragraphs (a)(1), (a)(3) and (f)(2) are revised to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

(a) *Motor vehicle safety*—(1) *In general.* A person who violates any of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, or 30141 through 30147 of Title 49 of the United States Code or a regulation prescribed under any of those sections is liable to the United States Government for a civil penalty of not more than \$6,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty under this paragraph for a related series of violations is \$17,350,000.

* * * * *

(3) *Section 30166.* A person who violates section 30166 of Title 49 of the United States Code or a regulation prescribed under that section is liable to the United States Government for a civil penalty for failing or refusing to allow or perform an act required under that section or regulation. The maximum penalty under this paragraph is \$6,000 per violation per day. The maximum penalty under this paragraph for a related series of daily violations is \$17,350,000.

* * * * *

(f) * * *

(2) A person that violates 49 U.S.C. Chapter 327 or a regulation prescribed or order issued thereunder, with intent to defraud, is liable for three times the actual damages or \$3,000, whichever is greater.

* * * * *

Issued on: December 15, 2010.

David L. Strickland,

Administrator.

[FR Doc. 2010–32008 Filed 12–20–10; 8:45 am]

BILLING CODE 4910–59–P

Proposed Rules

Federal Register

Vol. 75, No. 244

Tuesday, December 21, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FINANCIAL STABILITY OVERSIGHT COUNCIL

12 CFR Chapter XIII

Authority To Designate Financial Market Utilities as Systemically Important

AGENCY: Financial Stability Oversight Council.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “DFA”) gives the Financial Stability Oversight Council (the “Council”) the authority to identify and designate as systemically important a financial market utility if the Council determines that the failure, or a disruption to the functioning, of a financial market utility could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States. The DFA generally defines a “financial market utility” as any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and that person.¹ The utility-like arrangements used to settle financial transactions, whether involving payments, securities, derivatives, or other similar financial instruments, are critical parts of the financial infrastructure for the economy and are integral to the soundness of the financial system and overall economic performance. The importance of these arrangements has been highlighted by the recent period of market stress. This advance notice of proposed rulemaking (ANPR) invites public comment on the criteria and analytical framework that

should be applied by the Council in designating financial market utilities under the DFA.

DATES: Comments must be received by January 20, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this advance notice of proposed rulemaking according to the instructions for “Electronic Submission of Comments” below. All submissions must refer to the document title. The FSOC encourages the early submission of comments.

Electronic Submission of Comments. Interested persons must submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt, and enables the FSOC to make them available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through the method specified above.

Public Inspection of Public Comments. All properly submitted comments will be available for inspection and downloading at <http://www.regulations.gov>.

Additional Instructions. Please note the number of the question to which you are responding at the top of each response. Though the responses will be screened for obscenities and appropriateness, in general comments received, including attachments and other supporting materials, are part of the public record and are immediately available to the public. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Office of Domestic Finance, Treasury, at (202) 622–1703.

SUPPLEMENTARY INFORMATION: Sections 112(a)(2)(I) and 804(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “DFA”) give the Financial Stability Oversight Council

(the “Council”) the authority to identify and designate as systemically important a financial market utility if the Council determines that the failure, or a disruption to the functioning, of a financial market utility could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets and thereby threaten the stability of the financial system of the United States.

I. Background

The Council, which was established by section 111 of the DFA, has ten voting members and 5 nonvoting members.² It has several duties, including monitoring the financial services marketplace to identify potential threats to the financial stability of the United States and identifying those financial market utilities that should be designated by the Council as systemically important and subject to enhanced examination, supervision, enforcement and reporting standards and requirements.

Financial market utilities exist in a number of markets and provide many benefits, but also concentrate risk. The payment and settlement processes of such systems are also highly interdependent, either directly through operational, contractual or affiliation linkages, or indirectly through liquidity flows or common participants. Problems in the completion of settlement at one system could spill over to other systems or financial institutions in the form of liquidity and credit disruptions.

Through this ANPR the Council is seeking to gather information as it begins to develop the specific criteria and analytical framework by which it

² The voting members consist of the Secretary of the Treasury who also is the Chairperson of the Council, the Chairman of the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Director of the Bureau of Consumer Financial Protection, the Chairman of the Securities and Exchange Commission, the Chairperson of the Federal Deposit Insurance Corporation, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an independent member having insurance expertise appointed by the President with the advice and consent of the Senate. The nonvoting members are the Director of the Office of Financial Research; the Director of the Federal Insurance Office; and a State insurance commissioner, a State banking supervisor, and a State securities commissioner (or an officer performing like functions), each designated by a selection process determined by their respective state supervisors or commissioners.

¹ Section 803(6)(B) of the DFA excludes certain entities from the definition of a financial market utility, including designated contract markets and national securities exchanges.

will designate financial market utilities³ as systemically important⁴ under Title VIII of the DFA. This ANPR does not address the designation criteria and analytical framework for payment, clearing, or settlement activities carried out by financial institutions⁵, which the Council is considering separately.

a. Considerations in Making a Determination

Under section 804(a)(2) of the DFA, in making a determination on whether the financial market utility should be designated as systemically important, the Council must consider:

(A) The aggregate monetary value of transactions processed by the financial market utility;

(B) The aggregate exposure of the financial market utility to its counterparties;

(C) The relationship, interdependencies, or other interactions of the financial market utility with other financial market utilities or payment, clearing or settlement activities;

(D) The effect that the failure of or a disruption to the financial market utility would have on critical markets, financial institutions, or the broader financial system; and

(E) Any other factors that the Council deems appropriate.

b. Process for Making a Determination

Under the provisions of the DFA, the Council generally must provide a financial market utility with advance notice that it proposes to make a determination, and the financial market utility has up to 30 days to request a hearing.⁶ The Council must schedule the hearing within 30 days of receipt of the request. After holding a hearing, the Council has up to 60 days to make a final determination. If a financial market utility does not make a timely request for a hearing, the Council must notify the firm of its final determination within 30 days of the expiration of the 30-day period in which a hearing could have been requested. In making a determination, the Council must consult with the relevant supervisory agency for the financial market utility⁷ and the Board of Governors of the Federal Reserve System. Once designated, the Council can rescind a designation. The Council is not requesting comment on

these procedural requirements in this ANPR.

II. Criteria for Designation

1. What quantitative and qualitative information should the Council use to measure the factors it is required to consider in Section 804(a)(2) when making determinations under Section 804 of the DFA? How should quantitative and qualitative considerations be incorporated into the determination process?

2. Can the considerations listed in section 804(a)(2) be broken down into easily measured factors that the Council should use to determine whether financial market utilities are systemically important? Are there certain levels of quantitative measures (e.g., for value and exposure) or qualitative characteristics (e.g., registered clearing agencies versus exempt clearing agencies) that should trigger a review for systemic importance by the Council?

3. Which of the considerations listed in section 804(a)(2) are most important for the Council to consider? Should the application of the considerations differ depending on the type of FMU, and if so how?

4. How should the Council measure and assess the aggregate monetary value of transactions processed by financial market utilities?

a. For each type of financial market utility (e.g., central counterparty, funds transfer system), what is the best approach for measuring value (e.g., notional values, margin flows, net versus gross values)?

b. What time horizon/statistics should be used when assessing value (e.g., daily, monthly or annual averages; daily, monthly, or annual peaks?). Should the Council consider historical values, projected future values, or both?

c. Should different measures be applied to different types of financial market utilities based on their activities, products, or markets?

d. What is the best approach for measuring potential aggregate monetary values for start-up financial market utilities?

e. Should certain payment systems that transfer relatively low aggregate values be considered by the Council for designation as systemically important given that the system's failure or disruption could still cause widespread disruption, especially if there is no ready alternative means of making payments? For example, the failure or disruption of a system used extensively to make payments could leave a significant portion of the general public with unexpected overdrafts and/or lack

of liquid funds. If so, what factors should the Council consider in making a determination of systemic importance for such systems?

5. How should the Council measure and assess the aggregate exposure of financial market utilities engaged in payment, clearing, or settlement activities to its counterparties?

a. How should the Council identify the extent to which financial market utilities bear and create risk exposures for themselves and their participants?

b. What measures of exposure should be considered (e.g., liquidity exposures, current and potential future counterparty credit exposures, operational risk, the degree of concentration of exposures across participants)?

c. For each type of financial market utility (e.g., central counterparty, funds transfer system), what is the best approach for measuring current credit exposure or, where relevant, potential future exposures? For liquidity (funding), how might the Council assess the potential liquidity risks that a financial market utility may bear or liquidity risks it may impose on the broader financial system should it fail to settle as expected?

6. How should the Council identify, measure, and assess the effects of relationships, interdependencies, and other interactions of financial market utilities listed as considerations in section 804(a)(2)?

a. What role should models of interdependencies (e.g., correlations; stress tests) play in the Council's determinations?

b. What role should the nature of participants or counterparties play in the Council's determinations (e.g., common participants across utilities, systemic importance of participants)?

c. Should the Council consider the legal, corporate, or contractual relationships of financial market utilities in assessing relationships, interdependencies, and other interactions (e.g., common holding company, joint ventures, cross-margining agreements, service provider relationships)?

d. Should the Council consider whether there are readily available substitutes for the payment, clearing, and settlement services of financial market utilities?

7. How should the Council assess whether failures or disruptions to a financial market utility could potentially threaten the financial system of the United States?

a. What measures, information and thresholds should be used in assessing the effect of a financial market utility

³ As defined in Section 803(6) of the DFA.

⁴ As defined in Section 803(9) of the DFA.

⁵ As defined in Section 803(7) of the DFA.

⁶ The Council may waive or modify the advance notice and hearing requirements if the Council determines it is necessary to prevent or mitigate an immediate threat to the financial system posed by the FMU. DFA § 804(c)(3).

⁷ As defined in Section 803(8) of the DFA.

failure or disruption on critical markets and financial institutions? For example, how might the Council assess potential credit and liquidity effects and spillovers from a financial market utility disruption?

b. What factors should the Council consider when determining whether markets served by financial market utilities are critical? What qualitative or quantitative characteristics might lead the Council to scope in or out particular markets?

8. Title VIII of the DFA contains distinct provisions with respect to financial market utilities and financial institutions engaged in payment, clearing and settlement activities. What factors should the Council consider in distinguishing between a systemically important financial market utility and a financial institution that is very substantially engaged in a systemically important payment, clearing, or settlement activity?

9. What other types of information would be effective in helping the Council determine systemic importance? What additional factors does your organization consider when assessing exposure to, or the interconnectedness of, financial market utilities?

10. What role should international considerations play in designating financial market utilities?

Dated: December 14, 2010.

Alastair Fitzpayne,

*Deputy Chief of Staff and Executive Secretary,
Department of the Treasury.*

Statement of CFTC Chairman Gary Gensler

I support the advanced notice of proposed rulemaking on the Authority to Designate Financial Market Utilities as Systemically Important. It is an important step in fulfilling the requirements of the Dodd-Frank Act to ensure that there is robust oversight and risk management of financial market utilities including clearinghouses.

Clearinghouses in the futures markets have been around since the late-19th Century and have functioned both in clear skies and during stormy times—through the Great Depression, numerous bank failures, two world wars and the 2008 financial crisis—to lower risk to the American public. By standing between two counterparties, by valuing transactions daily, requiring collateral, and rigorous risk management standards, clearinghouses help ensure that the failure of one entity does not harm its counterparties and reverberate throughout the financial system. Comprehensive and robust regulatory

oversight of clearinghouses, however, is essential to our country's financial stability. This is particularly important since, under the Dodd-Frank Wall Street Reform and Consumer Protection Act, standardized swaps between financial entities must be brought to clearinghouses.

The Commodity Futures Trading Commission (CFTC) has overseen clearinghouses for decades. Currently, it oversees 14 clearinghouses and that number is expected to increase to approximately 20. The Dodd-Frank Act provides for enhanced oversight of these clearinghouses. In close consultation with the Securities and Exchange Commission, the Federal Reserve Board, other financial regulatory agencies, and international regulators, the CFTC is currently working to implement a series of rulemakings on risk management for clearinghouses. These rulemakings will take account of relevant international standards, particular those developed by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions (CPSS-IOSCO). In some instances, these rules also outline specific additional requirements for systemically important clearinghouses.

The Dodd-Frank Act gives the Financial Stability Oversight Council and the Federal Reserve Board important roles in clearinghouse oversight by authorizing the Council to designate certain clearinghouses as systemically important and by permitting the Federal Reserve to recommend heightened prudential standards in certain circumstances.

The advanced notice of proposed rulemaking being considered by this Council today complements the CFTC's rulemaking efforts. It seeks the public's input on how the Council should apply statutory criteria to determine which clearinghouses qualify for designation as systemically important.

At the CFTC, we plan on completing the rulemaking with regard to clearinghouses by the statutory deadline of July 15, 2011. Although the effective dates of these rules will generally be later in 2011, it is my recommendation that we as a Council be in position to identify systemically important clearinghouses by the summer of next year. This will provide clarity to clearinghouses and market participants as to the standards that they will have to uphold when the mandatory clearing of standardized swaps becomes effective.

[FR Doc. 2010-32005 Filed 12-20-10; 8:45 am]

BILLING CODE 4810-25-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2010-1200; Directorate Identifier 2010-NM-136-AD]

RIN 2120-AA64

Airworthiness Directives; Bombardier, Inc. Model BD-100-1A10 (Challenger 300) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Investigation of a recent high altitude loss of cabin pressurization on a BD-100-1A10 aircraft determined that it was caused by a partial blockage of a safety valve cabin pressure-sensing port, in conjunction with a dormant failure/leakage of the safety valve manometric capsule. The blockage, caused by accumulation of lint/dust on the grid of the port plug, did not allow sufficient airflow through the cabin pressure-sensing port to compensate for the rate of leakage from the manometric capsule, resulting in the opening of the safety valve. It was also determined that failure of the manometric capsule alone would not result in the opening of the safety valve.

* * * * *

The unsafe condition is possible loss of cabin pressure caused by the opening of the safety valve. The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 4, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* (202) 493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-40, 1200 New Jersey

Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514-855-5000; fax 514-855-7401; e-mail thd.crj@aero.bombardier.com; Internet <http://www.bombardier.com>. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425-227-1221.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647-5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE-171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228-7318; fax (516) 794-5531.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2010-1200; Directorate Identifier 2010-NM-136-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

On May 3, 2010, we issued AD 2010-10-18, Amendment 39-16297 (75 FR

27406, May 17, 2010). That AD required actions intended to address an unsafe condition on the products listed above.

In Note 2 of AD 2010-10-18, we explained that the AD did not mandate replacement of the cabin pressure-sensing port plug in both safety valves, with a new gridless plug and that we were considering further rulemaking. We now have determined that further rulemaking is necessary and this NPRM follows from that determination. The MCAI states:

Investigation of a recent high altitude loss of cabin pressurization on a BD-100-1A10 aircraft determined that it was caused by a partial blockage of a safety valve cabin pressure-sensing port, in conjunction with a dormant failure/leakage of the safety valve manometric capsule. The blockage, caused by accumulation of lint/dust on the grid of the port plug, did not allow sufficient airflow through the cabin pressure-sensing port to compensate for the rate of leakage from the manometric capsule, resulting in the opening of the safety valve. It was also determined that failure of the manometric capsule alone would not result in the opening of the safety valve.

This directive mandates a revision of the maintenance schedule, the [repetitive] cleaning of the safety valves, the removal of material from the area surrounding the safety valves and the modification of the safety valves with a gridless cabin pressure-sensing port plug.

The unsafe condition is possible loss of cabin pressure caused by the opening of the safety valve. The required actions also include a detailed visual inspection of the safety valves and surrounding areas for discrepant material (e.g., foreign material surrounding the safety valves, room temperature vulcanizing (RTV) sealant on safety valves, RTV excess on the bulkhead, tape near the safety valve opening, and, on certain airplanes, insulation near the safety valve opening, and foam in the area surrounding the safety valves), and for contamination found in the safety valve pressure ports. If contamination is found on the safety valve pressure ports, a detailed visual inspection for the presence of RTV on the outside and inside diameter of the pressure sensing port conduit is required. If discrepant materials are found, removing discrepant material, cleaning the surfaces of the valves, and securing insulation are required, as applicable. If the presence of RTV is detected, cleaning the surfaces of the valves and installing a new safety valve are required, as applicable. You may obtain further information by examining the MCAI in the AD docket.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 67 products of U.S. registry.

The actions that are required by AD 2010-10-18 and retained in this proposed AD take about 9 work-hours per product, at an average labor rate of \$85 per work hour. Required parts cost about \$0 per product. Based on these figures, the estimated cost of the currently required actions is \$765 per product.

We estimate that it would take about 1 work-hour per product to comply with the new basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Required parts would cost about \$0 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$5,695, or \$85 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–16297 (75 FR 27406, May 17, 2010) and adding the following new AD:

Bombardier, Inc.: Docket No. FAA–2010–1200; Directorate Identifier 2010–NM–136–AD.

Comments Due Date

(a) We must receive comments by February 4, 2011.

Affected ADs

(b) This AD supersedes AD 2010–10–18, Amendment 39–16297.

Applicability

(c) This AD applies to Bombardier, Inc. Model BD–100–1A10 (Challenger 300) airplanes, having serial numbers (S/Ns) 20001 through 20274 inclusive, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections. Compliance with these inspections is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these inspections, the operator may not be able to accomplish the inspections described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance according to paragraph (l) of this AD. The request should include a description of changes to the required inspections that will ensure the continued operational safety of the airplane.

Subject

(d) Air Transport Association (ATA) of America Code 21: Air conditioning.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

Investigation of a recent high altitude loss of cabin pressurization on a BD–100–1A10 aircraft determined that it was caused by a partial blockage of a safety valve cabin pressure-sensing port, in conjunction with a dormant failure/leakage of the safety valve manometric capsule. The blockage, caused by accumulation of lint/dust on the grid of the port plug, did not allow sufficient airflow through the cabin pressure-sensing port to compensate for the rate of leakage from the manometric capsule, resulting in the opening of the safety valve. It was also determined that failure of the manometric capsule alone would not result in the opening of the safety valve.

* * * * *

The unsafe condition is possible loss of cabin pressure caused by the opening of the safety valve.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2010–10–18, With No New Service Information

Actions

(g) For all airplanes: Within 30 days after June 1, 2010 (the effective date of AD 2010–10–18, Amendment 39–16297) revise the Airworthiness Limitations section of the Instructions for Continued Airworthiness by incorporating Tasks 21–31–09–101 and 21–31–09–102 in the Bombardier Temporary Revision (TR) 5–2–53, dated October 1, 2009, to Section 5–10–40, "Certification Maintenance Requirements," in Part 2 of Chapter 5 of Bombardier Challenger 300 BD–100 Time Limits/Maintenance Checks.

(1) For the new tasks identified in Bombardier TR 5–2–53, dated October 1, 2009: For airplanes identified in the "Phase-in" section of Bombardier TR 5–2–53, dated October 1, 2009, the initial compliance with the new tasks must be carried out in accordance with the phase-in schedule detailed in Bombardier TR 5–2–53, dated October 1, 2009, except where that TR specifies a compliance time from the date of the TR, this AD requires compliance within the specified time after June 1, 2010. Thereafter, except as provided by paragraph (l)(1) of this AD, no alternative to the task intervals may be used.

(2) When information in Bombardier TR 5–2–53, dated October 1, 2009, has been included in the general revisions of the applicable Airworthiness Limitations section, that TR may be removed from that Airworthiness Limitations section of the Instructions for Continued Airworthiness.

(h) For airplanes having S/Ns 20003 through 20173 inclusive, 20176, and 20177: Within 50 flight hours after June 1, 2010, do a detailed visual inspection of the safety valves and surrounding areas for discrepant material (e.g., foreign material surrounding the safety valves, room temperature vulcanizing (RTV) sealant on safety valves, RTV excess on the bulkhead, tape near the safety valve opening, and, on certain airplanes, insulation near the safety valve opening, and foam in the area surrounding the safety valves) and a detailed visual inspection for contamination (e.g., RTV, dust, or lint) in the safety valve pressure ports, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 100–25–14, dated June 30, 2008 (for airplanes having S/Ns 20124, 20125, 20128, 20134, 20139, 20143, 20146, 20148 to 20173 inclusive, 20176, and 20177); or Bombardier Service Bulletin 100–25–21, dated June 30, 2008 (for airplanes having S/Ns 20003 through 20123 inclusive, 20126, 20127, 20129 to 20133 inclusive, 20135 to 20138 inclusive, 20140 to 20142 inclusive, 20144, 20145, and 20147).

(1) If any discrepant material is found during the detailed visual inspection, before further flight, remove the discrepant material, clean the surfaces of the valves, and secure the insulation, as applicable, in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 100–25–14, dated June 30, 2008 (for airplanes having S/Ns 20124, 20125, 20128, 20134, 20139, 20143, 20146, 20148 to 20173 inclusive, 20176, and 20177); or Bombardier Service

Bulletin 100–25–21, dated June 30, 2008 (for airplanes having S/Ns 20003 through 20123 inclusive, 20126, 20127, 20129 to 20133 inclusive, 20135 to 20138 inclusive, 20140 to 20142 inclusive, 20144, 20145, and 20147).

(2) If contamination (*e.g.*, RTV, dust, or lint) is found on the safety valve pressure sensing ports, before further flight, do a detailed visual inspection of the outside and inside diameters of the pressure sensing port conduit for the presence of RTV; and do the actions specified in paragraph (h)(2)(i) and (h)(2)(ii) of this AD, as applicable; in accordance with the Accomplishment Instructions of Bombardier Service Bulletin 100–25–14, dated June 30, 2008 (for airplanes having S/Ns 20124, 20125, 20128, 20134, 20139, 20143, 20146, 20148 to 20173 inclusive, 20176, and 20177); or Bombardier Service Bulletin 100–25–21, dated June 30, 2008 (for airplanes having S/Ns 20003 through 20123 inclusive, 20126, 20127, 20129 to 20133 inclusive, 20135 to 20138 inclusive, 20140 to 20142 inclusive, 20144, 20145, and 20147).

(i) If no RTV is found, clean the plug of the sensing port.

(ii) If any RTV is found, install a new safety valve.

(i) For airplanes having S/Ns 20174, 20175, 20178 through 20189 inclusive, 20191 through 20228 inclusive, 20230 through 20232 inclusive, 20235, 20237, 20238, 20241, 20244, 20247, 20249 through 20251 inclusive, 20254, 20256 and 20259: Within 50 flight hours after June 1, 2010, clean the cabin pressure-sensing port plug in both safety valves, in accordance with Paragraph 2.B., “Part A—Modification—Cleaning,” of the Accomplishment Instructions of Bombardier Service Bulletin A100–21–08, dated June 18, 2009.

(j) For airplanes having S/Ns 20003 through 20189 inclusive, 20191 through 20228 inclusive, 20230 through 20232 inclusive, 20235, 20237, 20238, 20241, 20244, 20247, 20249 through 20251 inclusive, 20254, 20256, and 20259: Within

50 flight hours after June 1, 2010, clean the cabin pressure-sensing port plug in both safety valves, in accordance with Paragraph 2.B., “Part A—Modification—Cleaning,” of the Accomplishment Instructions of Bombardier Service Bulletin A100–21–08, dated June 18, 2009. Repeat the cleaning thereafter at intervals not to exceed 50 flight hours until the actions specified by paragraph (k) of this AD are completed.

New Requirements of This AD

(k) For airplanes, having S/Ns 20003 through 20189 inclusive, 20191 through 20228 inclusive, 20230 through 20232 inclusive, 20235, 20237, 20238, 20241, 20244, 20247, 20249 through 20251 inclusive, 20254, 20256, and 20259: Within 12 months after the effective date of this AD, replace the cabin pressure-sensing port plug having part number (P/N) 2844–060 in both safety valves with a new gridless plug having P/N 2844–19 and re-identify the safety valves, in accordance with Paragraph 2.C., “Part B—Modification—Replacement,” of the Accomplishment Instructions of Bombardier Service Bulletin A100–21–08, dated June 18, 2009. Doing the actions in paragraph (k) of this AD terminates the repetitive cleanings required by paragraph (j) of this AD.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(l) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, New York Aircraft Certification Office, ANE–170, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York

11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: A Federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

Related Information

(m) Refer to MCAI Canadian Airworthiness Directive CF–2010–06, dated February 24, 2010; and the service information specified in Table 1 of this AD; as applicable; for related information.

TABLE 1—SERVICE INFORMATION

Document	Date
Bombardier Service Bulletin A100–21–08	June 18, 2009.
Bombardier Service Bulletin 100–25–14	June 30, 2008.
Bombardier Service Bulletin 100–25–21	June 30, 2008.
Bombardier Temporary Revision 5–2–53, dated October 1, 2009, to Section 5–10–40, “Certification Maintenance Requirements,” in Part 2 of Chapter 5 of Bombardier Challenger 300 BD–100 Time Limits/Maintenance Checks.	October 1, 2009.

Issued in Renton, Washington, on December 14, 2010.

Ali Bahrami,

*Manager, Transport Airplane Directorate,
Aircraft Certification Service.*

[FR Doc. 2010–31972 Filed 12–20–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2010-1228; Directorate Identifier 2009-SW-12-AD]

RIN 2120-AA64

Airworthiness Directives; Eurocopter France Model AS350B, B1, B2, B3, BA, and EC130 B4 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the specified Eurocopter France (ECF) helicopters. This proposed AD results from a mandatory continuing airworthiness information (MCAI) AD issued by the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community. The superseding MCAI AD states that several engine flameouts have involved failure of the 41-tooth pinion in the engine accessory gearbox. Each affected helicopter had a starter-generator manufactured by one company. Investigation revealed the torque damping system of the starter-generator was inoperative due to incorrect adjustment and caused bending stresses on the 41-tooth pinion. Failure of the pinion causes the engine fuel pump to stop operating and results in an engine flameout. The EASA AD requires a new adjustment procedure to optimize the performance of the specified starter-generator damping assembly. These proposed AD actions are intended to prevent failure of a pinion and a fuel pump, engine flameout, and subsequent loss of control of the helicopter.

DATES: We must receive comments on this proposed AD by January 20, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* (202) 493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey

Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may get the service information identified in this proposed AD from American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053-4005, telephone (972) 641-3460, fax (972) 641-3527, or at <http://www.eurocopter.com>.

Examining the Docket: You may examine the AD docket on the Internet at <http://www.regulations.gov> or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (telephone (800) 647-5527) is stated in the **ADDRESSES** section of this proposal. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: DOT/FAA Southwest Region, Ed Cuevas, ASW-112, Aviation Safety Engineer, Rotorcraft Directorate, Safety Management Group, 2601 Meacham Blvd. Fort Worth, Texas 76137, telephone (817) 222-5355, fax (817) 222-5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written data, views, or arguments about this proposed AD. Send your comments to an address listed in the **ADDRESSES** section of this proposal. Include "Docket No. FAA-2010-1228; Directorate Identifier 2009-SW-12-AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The EASA, which is the Technical Agent for the Member States of the European Community, has issued EASA AD No. 2009-0027, dated February 18, 2009, which supersedes and cancels EASA AD No. 2009-0004, dated January 12, 2009, to correct an unsafe condition for the specified ECF model helicopters.

Pending additional investigations, EASA AD No. 2009-0004, dated January 12, 2009, required an inspection of the alignment and torque of the Aircraft Parts Corporation (APC) (currently UNISON) starter-generator damping assembly and, in case of discrepancies, conducting corrective actions. The MCAI AD states that failure of the 41-tooth pinion in the engine accessory gearbox resulted in engine flameouts. Each affected helicopter was equipped with starter-generators manufactured by APC. The additional investigations revealed the torque damping system of the starter-generator was inoperative due to incorrect adjustment. EASA AD No. 2009-0004 required a check of the tightness of the starter-generator damping system and angle measurements.

After further investigation, EASA issued AD 2009-0027, dated February 18, 2009, to require disassembling the damping system, replacing the cup springs and self-locking nut, and reassembling by following a new procedure, which has proven to be more reliable and optimizes the performance of the APC starter-generator damping assembly. The proposed actions are intended to prevent failure of a pinion and a fuel pump, engine flameout, and subsequent loss of control of the helicopter.

You may obtain further information by examining the MCAI AD and any related service information in the AD docket.

Related Service Information

ECF has issued Alert Service Bulletin (ASB) No. 80.00.07, Revision 1, dated February 6, 2009, for the Model AS350 B, BA, BB, B1, B2, and B3 helicopters (ASB 80.00.07); and ASB No. 80A003, Revision 1, dated February 6, 2009, for the Model EC130 B4 helicopter (80A003). The Model AS350 BB helicopter is not type certificated in the United States. ECF has received reports of ARRIEL engine flameouts due to failure of the 41-tooth pinion in the engine accessory gearbox. The failure of this pinion causes the fuel pump to stop and results in engine flameout. The affected helicopters had an APC starter-generator installed. Investigation revealed the torque damping system of the starter-generator to be inoperative due to incorrect adjustment. These ASBs specify disassembly of the damping system, replacing the

Belleville springs (cup springs) and the self-locking nut, and aligning the shaft damping system of the APC starter-generator. The actions described in the MCAI AD are intended to correct the unsafe condition identified in the service information.

FAA's Evaluation and Unsafe Condition Determination

These products have been approved by the aviation authority of France and are approved for operation in the United States. Pursuant to our bilateral agreement with France, EASA, their Technical Agent, has notified us of the unsafe condition described in the MCAI AD. We are proposing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other products of these same type designs. This proposed AD would require, within 110 hours time-in-service or 3 months, whichever occurs first:

- Modifying and marking the APC starter generator; and
- Before installing an APC starter-generator with a part number (P/N) of 150SG122Q or 200SGL130Q, complying with the requirements of this proposed AD.

Differences Between This Proposed AD and the MCAI AD

The MCAI AD refers to flight hours instead of hours time-in-service.

Costs of Compliance

We estimate that this proposed AD would affect about 847 helicopters. We also estimate that it would take about 3 work-hours per helicopter to modify the starter-generator. The average labor rate is \$85 per work-hour. ECF states in its ASBs that one nut (P/N 150SG1071, \$36.12) and two springs (P/N 150SG1093, \$29.14 each) are required for the P/N 150SG122Q starter-generator and one nut (P/N 150SG1071, \$36.12) and two springs (P/N 200SGL1093, \$33.64 each) are required for the P/N 200SGL130Q starter-generator. Based on these figures, we estimate the cost of the proposed AD on U.S. operators would be \$299,749 (\$215,985 for labor and \$83,764 for parts), assuming that both starter-generators are evenly distributed in the fleet and that the entire fleet is modified.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more

detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on product(s) identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Therefore, I certify this proposed AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared an economic evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Eurocopter France: Docket No. FAA-2010-1228; Directorate Identifier 2009-SW-12-AD.

Comments Due Date

- (a) We must receive your comments by January 20, 2011.

Other Affected ADs

- (b) None.

Applicability

(c) This AD applies to Model AS350B, B1, B2, B3, BA, and EC130 B4 helicopters with ARRIEL engines with Aircraft Parts Corporation (APC) starter-generators, part number (P/N) 150SG122Q or P/N 200SGL130Q without "004" marked on the identification plate, installed, certificated in any category.

Reason

(d) The mandatory continuing airworthiness information (MCAI) AD states that several engine flameouts involved failure of the 41-tooth pinion in the engine accessory gearbox that caused the engine fuel pump to fail. Each affected helicopter had an APC Company (currently UNISON) starter-generator installed. Investigation revealed the torque damping system of the starter-generator was inoperative. The EASA AD requires a new adjustment procedure to optimize the performance of the specified starter-generator damping assembly. The proposed actions are intended to prevent failure of a pinion and a fuel pump, engine flameout, and subsequent loss of control of the helicopter.

Actions and Compliance

(e) Within 110 hours time-in-service (TIS) or 3 months, whichever occurs first, unless already accomplished, do the following:

- (1) Replace the cup springs and fan nut, functionally test the damping system, and after this modification, mark "004" on the identification plate of the APC starter generator, as depicted in Figures 1 and 2, and by following the Accomplishment Instructions, paragraph 2.B.2., of Eurocopter Alert Service Bulletin (ASB) No. 80.00.07, Revision 1, dated February 6, 2009, for the Model AS350 B, BA, B1, B2, and B3 helicopters; or ASB No. 80A003, Revision 1, dated February 6, 2009, for the Model EC130 B4 helicopter.

(2) Before installing an APC starter-generator with P/N 150SG122Q or P/N 200SGL130Q, comply with the requirements of this AD.

Differences Between This AD and the MCAI AD

- (f) The MCAI AD refers to flight hours instead of hours time-in-service.

Other Information

(g) Alternative Methods of Compliance (AMOCs): The Manager, Safety Management Group, ATTN: DOT/FAA Southwest Region, Ed Cuevas, ASW-112, Aviation Safety Engineer, Rotorcraft Directorate, Safety Management Group, 2601 Meacham Blvd. Fort Worth, Texas 76137, telephone (817) 222-5355, fax (817) 222-5961, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

- (h) EASA AD No. 2009-0027, dated February 18, 2009, which supersedes and

cancels EASA AD No. 2009–0004, dated January 12, 2009, contains related information.

Joint Aircraft System/Component (JASC) Code

(i) The JASC Code is 2435: Starter-Generator.

Issued in Fort Worth, Texas, on December 6, 2010.

Lance T. Gant,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2010–31963 Filed 12–20–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1255; Directorate Identifier 2010–CE–059–AD]

RIN 2120–AA64

Airworthiness Directives; B–N Group Ltd. Model BN–2, BN–2A, BN–2A–2, BN–2A–3, BN–2A–6, BN–2A–8, BN–2A–9, BN–2A–20, BN–2A–21, BN–2A–26, BN–2A–27, BN–2B–20, BN–2B–21, BN–2B–26, BN–2B–27, BN–2T, and BN–2T–4R Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

An event has been reported where Glass Fibre Reinforced Plastic (GFRP) elevator tips have been found deformed on in-service aircraft. The outboard three inches of the elevator tip assembly profiles (top and bottom surfaces) had changed from being convex profiles to concave profiles. There is concern that this could potentially result in, or be caused by, internal structural delamination and/or failure. Such a failure could have a serious effect on the aircraft handling and could potentially result in loss of control of the aircraft.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by February 4, 2011.

ADDRESSES: You may send comments by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the instructions for submitting comments.

- **Fax:** (202) 493–2251.

- **Mail:** U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery:** U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Airworthiness, Britten-Norman Aircraft Ltd., Bembridge Airport, Isle of Wight, PO35 5PR, United Kingdom; telephone: +44(0) 20 3371 4000; fax: +44(0) 20 3371 4001; e-mail:

jim.roberts@bnaircraft.com. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call 816–329–4148.

Examining the AD Docket

You may examine the AD docket on the Internet at <http://www.regulations.gov>; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT:

Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4138; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA–2010–1255; Directorate Identifier 2010–CE–059–AD” at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this

proposed AD because of those comments.

We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No.: 2009–0105R2, dated March 9, 2010 (referred to after this as “the MCAI”), to correct an unsafe condition for the specified products. The MCAI states:

An event has been reported where Glass Fibre Reinforced Plastic (GFRP) elevator tips have been found deformed on in-service aircraft. The outboard three inches of the elevator tip assembly profiles (top and bottom surfaces) had changed from being convex profiles to concave profiles. There is concern that this could potentially result in, or be caused by, internal structural delamination and/or failure. Such a failure could have a serious effect on the aircraft handling and could potentially result in loss of control of the aircraft.

For the reasons stated above, the initial issue of this AD (AD 2009–0105) mandated inspection of the GFRP elevator tips and replacement of any deformed parts.

Its Revision 1 (AD 2009–0105R1) extends the compliance time by three months.

Its Revision 2 (AD 2009–0105R2) extends the compliance time by an additional three months.

Relevant Service Information

Britten-Norman Aircraft Limited has issued Service Bulletin Number BN–2/ SB 313, Issue 3, dated February 24, 2009; Drawing NB–31–235, Issue 13; Drawing NB–31–873, Issue 2; and Drawing NB–31–0906, Issue 3. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA’s Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

We estimate that this proposed AD will affect 135 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is \$85 per work-hour. Required parts would cost about \$10,000 per product.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be \$1,372,950, or \$10,170 per product.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and

responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

The Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

B-N Group Ltd.: Docket No. FAA-2010-1255; Directorate Identifier 2010-CE-059-AD.

Comments Due Date

- (a) We must receive comments by February 4, 2011.

Affected ADs

- (b) None.

Applicability

- (c) This AD applies to B-N Group Ltd. Models BN-2, BN-2A, BN-2A-2, BN-2A-3, BN-2A-6, BN-2A-8, BN-2A-9, BN-2A-20, BN-2A-21, BN-2A-26, BN-2A-27, BN-2B-20, BN-2B-21, BN-2B-26, BN-2B-27, BN-2T, and BN-2T-4R airplanes, all serial numbers, certificated in any category.

Subject

- (d) Air Transport Association of America (ATA) Code 27: Flight Controls.

Reason

- (e) The mandatory continuing airworthiness information (MCAI) states:

An event has been reported where Glass Fibre Reinforced Plastic (GFRP) elevator tips have been found deformed on in-service aircraft. The outboard three inches of the elevator tip assembly profiles (top and

bottom surfaces) had changed from being convex profiles to concave profiles. There is concern that this could potentially result in, or be caused by, internal structural delamination and/or failure. Such a failure could have a serious effect on the aircraft handling and could potentially result in loss of control of the aircraft.

For the reasons stated above, the initial issue of this AD (AD 2009-0105) mandated inspection of the GFRP elevator tips and replacement of any deformed parts.

Its Revision 1 (AD 2009-0105R1) extends the compliance time by three months.

Its Revision 2 (AD 2009-0105R2) extends the compliance time by an additional three months.

Actions and Compliance

- (f) Unless already done, do the following actions:

(1) Before further flight after the effective date of this AD, visually inspect for deformation of shape and signs of concavity the elevator tip assemblies (top and bottom surfaces) as instructed in paragraphs 6 and 9 of Britten-Norman Aircraft Limited Service Bulletin Number BN-2/SB 313, Issue 3, dated February 24, 2009. If no sign of deformity or concavity is found as a result of the inspection required by paragraph (f)(1) of this AD, no further action is required by this AD except for the requirements of paragraph (f)(3) of this AD.

(2) If signs of deformation or concavity are found, before further flight, inspect for delamination the elevator tip as instructed in paragraph 9 of Britten-Norman Aircraft Limited Service Bulletin Number BN-2/SB 313, Issue 3, dated February 24, 2009.

(i) If delamination is found as a result of any inspection required by this AD, before further flight, replace the elevator tip with a serviceable elevator tip following Britten-Norman Ltd. Drawing NB-31-235, Issue 13; Britten-Norman Ltd. Drawing NB-31-873, Issue 2; or Britten-Norman Ltd. Drawing NB-0906, Issue 3, as applicable to airplane models.

(ii) If no delamination is found as a result of any inspection required by this AD, at intervals not to exceed 50 hours time-in-service (TIS) and until accomplishment of paragraph (f)(2)(iii) of this AD, inspect for delamination the elevator tip as instructed in paragraph 9 of Britten-Norman Aircraft Limited Service Bulletin Number BN-2/SB 313, Issue 3, dated February 24, 2009.

(iii) Within 12 months after the effective date of this AD, unless already done as required by paragraph (f)(2)(i) of this AD, replace the elevator tip with a serviceable elevator tip following Britten-Norman Ltd. Drawing NB-31-235, Issue 13; Britten-Norman Ltd. Drawing NB-31-873, Issue 2; or Britten-Norman Ltd. Drawing NB-31-0906, Issue 3, as applicable to airplane models.

(3) After the effective date of this AD, do not install elevator tips on any airplane, unless they have already been inspected in accordance with Britten-Norman Aircraft Limited Service Bulletin Number BN-2/SB 313, Issue 3, dated February 24, 2009, and determined to be free from concavity and delamination.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) Alternative Methods of Compliance (AMOCs): The Manager, Standards Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329-4138; fax: (816) 329-4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) Airworthy Product: For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) Reporting Requirements: For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave., SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES-200.

Related Information

(h) Refer to MCAI EASA AD No.: 2009-0105R2, dated March 9, 2010; Britten-Norman Aircraft Limited Service Bulletin Number BN-2/SB 313, Issue 3, dated February 24, 2009, Britten-Norman Ltd. Drawing NB-31-235, Issue 13; Britten-Norman Ltd. Drawing NB-31-873, Issue 2; and Britten-Norman Ltd. Drawing NB-31-0906, Issue 3. For service information related to this AD, contact Airworthiness, Britten-Norman Aircraft Ltd., Bembridge Airport, Isle of Wight, PO35 5PR, United Kingdom; telephone: +44(0) 20 3371 4000; fax: +44(0) 20 3371 4001; e-mail: jim.roberts@bnaircraft.com. You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For

information on the availability of this material at the FAA, call 816-329-4148.

Issued in Kansas City, Missouri, on December 14, 2010.

William J. Timberlake,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010-31983 Filed 12-20-10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-63556; File No. S7-43-10]

RIN 3235-AK88

End-User Exception to Mandatory Clearing of Security-Based Swaps

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Securities and Exchange Commission ("Commission") is proposing new Rule 3Cg-1 under the Securities Exchange Act of 1934 ("Exchange Act") governing the exception to mandatory clearing of security-based swaps available for counterparties meeting certain conditions. The Commission is requesting comments on the proposed rule and related matters.

DATES: Comments must be received on or before February 4, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. S7-43-10 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File No. S7-43-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please

use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

Peter Curley, Attorney Fellow, at (202) 551-5696, or Andrew Blake, Special Counsel, at (202) 551-5846, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION: In accordance with Section 763(a) of Title VII ("Title VII") of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the Commission is proposing Rule 3Cg-1 under the Exchange Act to govern the exception to mandatory clearing of security-based swaps available to counterparties to security-based swaps meeting certain conditions. The Commission is soliciting comments on all aspects of the proposed rule and alternative rule language and will carefully consider any comments received.

I. Introduction

On July 21, 2010, the President signed the Dodd-Frank Act into law.¹ The Dodd-Frank Act was enacted to, among other purposes, promote the financial stability of the United States by improving accountability and transparency in the financial system.² Title VII of the Dodd-Frank Act provides the Commission and the Commodity Futures Trading Commission ("CFTC") with the authority to regulate over-the-counter ("OTC") derivatives in light of the recent financial crisis, which demonstrated the need for enhanced regulation in the OTC derivatives market.

The Dodd-Frank Act provides that the CFTC will regulate "swaps," the Commission will regulate "security-based swaps," and the CFTC and the Commission will jointly regulate "mixed swaps."³ The Dodd-Frank Act amends

¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

² See Public Law 111-203, Preamble.

³ Section 712(d) of the Dodd-Frank Act provides that the Commission and the CFTC, in consultation

the Exchange Act⁴ to require, among other things, the following: (1) Transactions in security-based swaps must be cleared through a clearing agency if they are of a type that the Commission determines must be cleared, unless an exemption from mandatory clearing applies;⁵ (2) transactions in security-based swaps must be reported to a registered security-based swap data repository ("SDR") or the Commission;⁶ and (3) if a security-based swap is subject to a clearing requirement, it must be traded on a registered exchange or a registered or exempt security-based swap execution facility, unless no facility makes such security-based swap available for trading.⁷

The Dodd-Frank Act seeks to ensure that, wherever possible and appropriate, derivatives contracts formerly traded exclusively in the OTC market be cleared.⁸ One key way in which the Dodd-Frank Act promotes clearing of such contracts is by setting forth a process by which the Commission would determine whether a security-based swap is required to be cleared; if the Commission makes a determination that a security-based swap is required to be cleared, then parties may not engage in such security-based swap without

submitting it for clearing unless an exception applies.

Standards for mandatory clearing of security-based swaps are established by Exchange Act Section 3C(a)(1).⁹ The purpose of mandatory clearing of security-based swap products is to centralize individual counterparty risks through a clearing agency acting as a central counterparty that distributes risk among the clearing agency's participants. Exchange Act Section 3C(g) provides that a security-based swap otherwise subject to mandatory clearing is not required to be cleared if one party to the security-based swap is not a financial entity, is using security-based swaps to hedge or mitigate commercial risk, and notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps (the "end-user clearing exception").¹⁰ Though beneficial for reasons such as those described above, mandatory clearing of security-based swaps may also alter the burdens on non-financial end-users of derivatives relative to bilateral transactions, and thereby possibly affect their risk management practices.¹¹ Exchange Act Section 3C(g) is designed to permit non-financial end-users that meet the specified conditions to elect not to

centrally clear security-based swaps and retain flexibility to use both cleared and non-cleared security-based swaps in their risk management activities.

The Dodd-Frank Act provides the Commission with authority to adopt rules governing the end-user clearing exception and to prescribe rules, issue interpretations or request information from persons claiming the end-user clearing exception necessary to prevent abuse of the exception.¹² The Commission is also required to consider whether to exempt small banks, savings associations, farm credit system institutions and credit unions from the definition of "financial entity" contained in Exchange Act Section 3C(g)(3)(A). The Commission is proposing Rule 3Cg-1 under the Exchange Act to specify requirements for using the exception to mandatory clearing of security-based swaps established by Exchange Act Section 3C(g), together with proposed alternative language to provide an exemption for small banks, savings associations, farm credit system institutions and credit unions.

II. Description of Proposed Rule

A. Notification to the Commission

In order to qualify for the end-user clearing exception, a non-financial entity¹³ that uses security-based swaps to hedge or mitigate commercial risk must notify the Commission how it generally meets its financial obligations associated with non-cleared security-based swaps.¹⁴ The Exchange Act authorizes the Commission to establish rules regarding such notification as well as to prescribe rules as may be necessary

with the Board of Governors of the Federal Reserve System ("Federal Reserve"), shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement." These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term "eligible contract participant," in Section 1a(18) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(18), as redesignated and amended by Section 721 of the Dodd-Frank Act. See Exchange Act Release Nos. 62717 (Aug. 13, 2010), 75 FR 51429 (Aug. 20, 2010) (File No. S7-16-10) (advance joint notice of proposed rulemaking regarding definitions contained in Title VII of the Dodd-Frank Act) ("Definitions Release"); 63452 (Dec. 7, 2010) ("Definitions Proposing Release").

⁴ All references to the Exchange Act contained in this release refer to the Securities Exchange Act of 1934, as amended by the Dodd-Frank Act.

⁵ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C).

⁶ See Public Law 111-203, sec. 763(i) and sec. 766(a) (adding Exchange Act Sections 13(m)(1)(G) and 13A(A)(1), respectively).

⁷ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C). See also Public Law 111-203, sec. 761 (adding Exchange Act Section 3(a)(77) (defining the term "security-based swap execution facility").

⁸ See, e.g., Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010, S. Rep. No. 111-176 at 34 (stating that "[s]ome parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible.").

⁹ See Exchange Act Release No. 63557 (Dec. 15, 2010) ("Mandatory Clearing Release").

¹⁰ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)). This clearing exception is elective. When trading with a security-based swap dealer and a major security-based swap participant, counterparties that are not swap dealers, security-based swap dealers, major swap participants or major security-based swap participants have the right to forgo the end-user clearing exception and require clearing for a security-based swap that is subject to a Commission clearing mandate. These counterparties are granted a similar right when a security-based swap has been listed for clearing, but is not the subject of a Commission clearing mandate. See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(5)). The choice to require or forgo clearing is solely at the non-financial counterparty's discretion. See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(2)).

¹¹ Burdens that may rest upon non-financial end-users arising from central clearing could include clearing fees and the requirement to post initial and variation margin. The net cost of these burdens to non-financial end-users is expected to vary. In particular, the final net cost to non-financial end-users would also need to account for the fees and charges of dealers and other counterparties to security-based swaps with non-financial end-users and for any bilateral margin or other collateral requirements established in connection with such transactions. As a result, it is possible that the costs for an end-user to engage in a centrally cleared transaction may be less than for comparable bilateral transactions in some circumstances. The Commission is requesting comments on the costs experienced by non-financial end-users in connection with both cleared and non-cleared security-based swaps.

¹² See Public Law 111-203, sec. 712(f). See also Pub. L. No. 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(6)).

¹³ Exchange Act Section 3C(g)(1)(A) limits availability of the end-user clearing exception to circumstances when one of the counterparties to the security-based swap is not a financial entity. The term financial entity is defined in Section 3C(g)(3)(A) of the Exchange Act, and includes the following eight entities: (i) A swap dealer; (ii) a security-based swap dealer; (iii) a major swap participant; (iv) a major security-based swap participant; (v) a commodity pool as defined in section 1a(10) of the Commodity Exchange Act; (vi) a private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)); (vii) an employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or (viii) a person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956. Four of these terms, "swap dealer", "major swap participant", "security-based swap dealer" and "major security-based swap participant" are themselves the subject of current proposed joint rulemaking by the Commission and the CFTC. Definitions Proposing Release, *supra* note 3.

¹⁴ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(1)(C)).

to prevent abuse of the end-user clearing exception.¹⁵ The Commission is proposing Rule 3Cg-1 to require non-financial entities to notify the Commission each time the end-user clearing exception is used by delivering certain information to an SDR in the manner required by proposed Exchange Act Regulation SBSR.¹⁶ The Commission believes that receiving a notification for each transaction may provide for a more complete picture regarding how end-users meet their financial obligations based on the transactions in which they engage. The specified additional information would be delivered to the SDR by the reporting party defined in proposed Regulation SBSR (the "Reporting Party")¹⁷ together with other information regarding the security-based swap separately required by proposed Regulation SBSR. Under the applicable requirements of proposed Regulation SBSR, the additional information required by proposed Rule 3Cg-1 would be delivered to the SDR in the same electronic format established by the SDR for purposes of proposed Regulation SBSR,¹⁸ promptly after the security-based swap transaction is executed, which for information of this kind would be no later than:

- 15 minutes after the time of execution for a security-based swap that is executed and confirmed electronically;
- 30 minutes after the time of execution for a security-based swap that is confirmed electronically but not executed electronically; or
- 24 hours after execution for a security-based swap that is not executed or confirmed electronically.¹⁹

The information delivered to the SDR pursuant to Rule 3Cg-1 would need to be accurate as of the date and time the information is delivered to the SDR.²⁰

The Commission believes that this requirement should improve transaction efficiency by allowing notification to be made in a manner consistent with other transaction reporting requirements being developed pursuant to the Dodd-Frank Act. The timing requirements should also ensure the Commission has up to date information as of the time of submission.

1. Meeting Financial Obligations

A non-financial entity invoking the end-user clearing exception must notify the Commission of "how it generally meets its financial obligations associated with non-cleared security-based swaps" ("Financial Obligation Notice").²¹ Under existing market practices, counterparties to security-based swaps regularly use forms of collateral support both to create incentives for obligors to meet their financial obligations under the agreements and to provide themselves with access to some asset of value that can be sold or the value of which can be applied in the event of default.²² Though not required by Exchange Act Section 3C(g), such individualized credit arrangements between counterparties in bilateral security-based swap transactions can be important components of risk management consistent with the policy rationale of ensuring that the end-user clearing exception is reasonably available to non-financial entities hedging or mitigating commercial risks.²³

However, a principal feature distinguishing cleared security-based swaps from non-cleared security-based swaps is that non-cleared security-based swaps do not provide a uniform method of mitigating such counterparty credit

risk.²⁴ Given this lack of uniformity, proposed Rule 3Cg-1(a)(5) would require a counterparty relying on the end-user clearing exception to provide certain information as part of its notification to the Commission regarding the methods used to mitigate credit risk in connection with non-cleared security-based swaps. If more than one method is used then information must be provided regarding each applicable method. Notification of all methods, as proposed in proposed Rule 3Cg-1(a)(5), would provide the Commission with more complete information regarding the risk characteristics of non-cleared security-based swaps used by non-financial entities to hedge or mitigate commercial risk.

Proposed Rule 3Cg-1(a)(5)(i) requires notification to the Commission regarding whether a credit support agreement is being used in connection with the non-cleared security-based swap. For these purposes, the term credit support agreement refers to any agreement, or annex, amendment or supplement to another agreement, which contemplates the periodic transfer of specified collateral to or from another party to support payment obligations associated with the security-based swap. Agreements of this kind are frequently used to mitigate the counterparty credit risk of security-based swaps and other derivatives that are not centrally cleared, but the use of such arrangements may be more or less common among certain types of counterparties and for certain types of security-based swaps.²⁵ The proposed notification would provide the Commission with information regarding the extent to which credit support agreements are used by non-financial entities to support their financial obligations associated with non-cleared security-based swaps.

Proposed Rule 3Cg-1(a)(5)(ii) requires notification to the Commission regarding whether the financial obligations associated with the non-cleared security-based swap are secured by collateral pledged under a written security arrangement not requiring the transfer of possession of collateral to either of the security-based swap counterparties. Examples of this type of

¹⁵ See Public Law 111-203, sec. 712(f) and sec. 763(a) (adding Exchange Act Sections 3C(g)(1)(C) and 3C(g)(6)).

¹⁶ See Exchange Act Release No. 63346 (Nov. 18, 2010), 75 FR 75208 (Dec. 2, 2010) ("Regulation SBSR Proposing Release"). Regulation SBSR contemplates that information may be delivered to the Commission directly in limited circumstances when an SDR is not available. When permitted by Regulation SBSR, such delivery would also meet the end-user clearing exception notice requirement. Persons wishing to comment on the requirements of proposed Regulation SBSR should submit comments pursuant to the Regulation SBSR Proposing Release.

¹⁷ Proposed Exchange Act Rule 901(a) under Regulation SBSR defines which of the parties to a security-based swap will be designated the Reporting Party for these purposes. See *id.*

¹⁸ See *id.* (proposed Rules 901(h) and 907(a)(2) of proposed Regulation SBSR).

¹⁹ See *id.* (proposed Rule 901(d)(2) of proposed Regulation SBSR).

²⁰ See *id.* (for each security-based swap transaction made in reliance on the end-user

clearing exception, proposed Rule 901(d)(1)(ix) under Regulation SBSR requires parties to a security-based swap to indicate whether or not the end-user clearing exception is being invoked when reporting transaction information to an SDR as required by Exchange Act Section 13(m)(1)(F). The information required under proposed Exchange Act Rule 3Cg-1 is separate from these requirements but would be delivered to the SDR by the Reporting Party in the same manner as required by proposed Regulation SBSR).

²¹ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(1)(C)).

²² See ISDA Collateral Steering Committee, Market Review of OTC Derivative Bilateral Collateralization Practices (2.0), (March 1, 2010) (available at http://www.isda.org/c_and_a/pdf/Collateral-Market-Review.pdf) ("ISDA Collateralization Practices") (explaining credit risk, methods of risk mitigation and the context for collateralization as a risk reduction technique).

²³ See 156 Cong. Rec. S6192 (daily ed. July 22, 2010) (letter from Sen. Dodd and Sen. Lincoln to Rep. Frank and Rep. Peterson (the "Dodd-Lincoln Letter"))).

²⁴ See ISDA Collateralization Practices, *supra* note 22 (describing methods of risk mitigation used in connection with OTC Derivatives and key legal foundations supporting collateralization).

²⁵ See ISDA Collateralization Practices, *supra* note 22. See also ISDA, ISDA Margin Survey 2010 (available at http://www.isda.org/c_and_a/pdf/ISDA-Margin-Survey-2010.pdf) ("ISDA Margin Survey 2010") (describing collateralization levels for derivatives transactions by counterparty type, product type and types of collateral received).

arrangement include, but are not limited to, (i) agreements granting security interests over property of the reporting person, whether or not such security interests are perfected by the filing of a mortgage, financing statements or similar documents, and (ii) agreements to transfer assets to collateral agents or escrow agents acting pursuant to instructions agreed by both parties to a security-based swap. While such arrangements may be somewhat less commonly used to mitigate credit risk associated with non-cleared security-based swaps, the Commission preliminarily believes these methods may have particular importance for certain categories of non-financial entities, such as enterprises with high levels of fixed assets relative to cash flows.²⁶ Accordingly, the Commission preliminarily considers it appropriate to separately categorize this information in the data proposed to be collected.

Proposed Rule 3Cg-1(a)(5)(iii) requires notification to the Commission regarding whether the financial obligations associated with the non-cleared security-based swap are guaranteed by a person or entity other than the counterparty invoking the end-user clearing exception. The proposed notification would provide the Commission with information regarding the manner in which financial obligations are met by providing information regarding the use of guarantees by third parties (such as parent companies, affiliated parties or others) in meeting financial obligations associated with non-cleared security-based swaps.²⁷

Proposed Rule 3Cg-1(a)(5)(iv) requires notification to the Commission regarding whether the counterparty invoking the end-user clearing exception intends to meet its obligations associated with the security-based swap solely by utilizing available financial resources (*i.e.*, its general creditworthiness).²⁸ Financial resources

that might be available to meet obligations associated with non-cleared security-based swaps may include any number of sources, including existing assets, investments and cash balances, cash flow from operations, short-term and long-term lines of credit and capital market sources of funding.

Proposed Rule 3Cg-1(a)(5)(v) requires notification to the Commission regarding whether the counterparty invoking the end-user clearing exception intends to employ means other than those described in proposed Rules 3Cg-1(a)(5)(i), (ii), (iii), or (iv) to meet its financial obligations associated with a security-based swap. This item is intended to separately categorize all other methods that may be used in the markets today or that may develop in the future for meeting obligations associated with non-cleared security-based swaps relying on the end-user clearing exception to provide a clearer picture of the manner in which an end-user is meeting its financial obligations. The Commission anticipates many entities would meet their financial obligations through one of the specific methods listed in Rule 3Cg-1(a)(5)(i), (ii), (iii), or (iv). The information collected pursuant to proposed Rule 3Cg-1(a)(5)(v), however, may allow the Commission to gain greater insight regarding the potential existence of other means for meeting financial obligations, as well as whether there is a significant number of transactions that would justify more granular rules concerning the manner in which end-users are meeting their financial obligations in the future with respect to whether and how end-users are using other credit risk mitigating methodologies to support meeting their financial obligations associated with non-cleared security-based swaps.

2. Preventing Abuse of the End-User Clearing Exception

The remaining items of information required by proposed Rule 3Cg-1, specifically proposed Rules 3Cg-1(a)(1), (2), (3), (4) and (6), are designed to affirm compliance with particular requirements of Exchange Act Section 3C(g) or otherwise produce information necessary to aid the Commission in its efforts to prevent abuse of the end-user clearing exception as contemplated by Exchange Act Section 3C(g)(6).²⁹

static/publications/handbook/deriv.pdf (contemplating that evaluations of individual counterparty credit limits should aggregate limits for derivatives with credit limits established for other activities, including commercial lending).

²⁹ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(6)). See also Public Law 111-203, sec. 764 (adding Exchange Act Section

Proposed Rule 3Cg-1(a)(1) requires identifying which of the counterparties to the security-based swap is invoking the end-user clearing exception. At least one counterparty must be identified for each security-based swap that will rely on the end-user clearing exception. When both counterparties to a security-based swap are non-financial entities and meet the other requirements of the end-user clearing exception, both parties may choose to use the exception and provide the required information to the SDR.

Proposed Rule 3Cg-1(a)(2) requires information to be provided regarding the status of the counterparty invoking the end-user clearing exception as a non-financial entity under Section 3C(g)(3) of the Act.³⁰ This information is being solicited because the exception to mandatory clearing of security-based swaps under Exchange Act Section 3C(g) is only available to persons that are not financial entities, or are affiliates of non-financial entities satisfying the requirements of Exchange Act Section 3C(g)(4).

Proposed Rule 3Cg-1(a)(3) requires information to be provided regarding whether the counterparty invoking the end-user clearing exception is an affiliate of another person qualifying for the exception under Exchange Act Section 3C(g), and satisfies the additional requirements of Exchange Act Section 3C(g)(4).³¹ Section 3C(g)(4) of the Exchange Act contains a number of provisions specially designed for finance affiliates of persons qualifying for the end-user clearing exception, and among other things does not permit finance affiliates that are themselves swap dealers, security-based swap dealers, major swap participants, major security-based swap participants or certain other defined categories of entities to use the end-user clearing exception as an agent for another entity in any circumstances.³² Given these

15F of the Exchange Act creating new business conduct standards applicable to interactions of security-based swap dealers and major security-based swap participants with other counterparties).

³⁰ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(3)).

³¹ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(4)).

³² Exchange Act Section 3C(g)(4)(A) provides that affiliates of persons qualifying for the end-user clearing exception will also qualify for the end-user clearing exception if the affiliate (1) acts on behalf of the person and as agent, (2) uses the security-based swap to hedge or mitigate commercial risk of that person or another affiliate of that person that is not a financial entity as defined in Exchange Act Section 3C(g)(3), and (3) is not itself one of seven entities defined in Exchange Act Section 3C(g)(4)(B). See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(4)(A)). The

Continued

²⁶ See ISDA Margin Survey 2010, *supra* note 25, at 9 (noting types of non-ISDA collateral agreements used and frequency of use).

²⁷ See ISDA Collateralization Practices, *supra* note 22, at 20 (identifying master cross-netting and cross-guarantee structures as common credit risk mitigation practices); see also ISDA 2002 Master Agreement, Multicurrency—Cross Border Schedule, Part 4(f) (contemplating bank letters of credit and third party guarantees as credit support documents).

²⁸ For a variety of reasons one or both of the counterparties to some non-cleared security-based swaps may choose not to mitigate credit risk and instead rely on the general creditworthiness of their opposite counterparty, given the circumstances and financial terms of the transaction. See, e.g., Office of the Comptroller of Currency, Risk Management of Financial Derivatives, Comptroller's Handbook, at 50 (Jan. 1997) (available at <http://www.occ.gov/>

additional features, the Commission preliminarily believes it is appropriate to separately categorize security-based swaps transacted by finance affiliates in particular in order to aid the Commission in its efforts to prevent abuse of the end-user clearing exception by being able to readily identify entities that qualify as financial entities and are participating in the use of the exception.

Proposed Rule 3Cg-1(a)(4) requires information to be provided regarding whether the counterparty invoking the end-user clearing exception uses the security-based swap being reported to hedge or mitigate commercial risk. The exception to mandatory clearing of security-based swaps pursuant to Section 3C(g) of the Exchange Act is only available to persons that use security-based swaps to hedge or mitigate commercial risk. The Commission has proposed to adopt Exchange Act Rule 3a67-4 to define the meaning of hedging or mitigating commercial risk for these purposes.³³

Proposed Rule 3Cg-1(a)(6) requires all counterparties invoking the end-user clearing exception to indicate whether they are an issuer of securities registered under Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d) ("SEC Filer").³⁴ Under Exchange Act Section 3C(i), the exception to mandatory clearing of security-based swaps

pursuant to Exchange Act Section 3C(g) is available to SEC Filers only if an appropriate committee of the issuer's board of directors or governing body has reviewed and approved the issuer's decision to enter into security-based swaps that are subject to the exception.³⁵ When the counterparty invoking the end-user clearing exception is an SEC Filer, two additional items of information must be provided:

- Proposed Rule 3Cg-1(a)(6)(i) requires an SEC Filer invoking the end-user clearing exception to specify its SEC Central Index Key number. Collection of this information will allow the Commission to cross reference materials filed with the relevant SDR with information in periodic reports and other materials filed by the SEC Filer with the Commission.³⁶

- Proposed Rule 3Cg-1(a)(6)(ii) requires confirmation that an appropriately authorized committee of the board of directors or equivalent governing body of the SEC Filer invoking the clearing exception has reviewed and approved the decision to enter the security-based swap subject to the end-user clearing exception.³⁷ The Commission preliminarily believes collection of this information is appropriate to promote compliance with the requirements of the end-user clearing exception.

Request for Comment

The Commission generally requests comments on all aspects of proposed Rule 3Cg-1. Additionally, the Commission requests comments on the following specific issues:

- Is it sufficiently clear what information the Commission is requiring to be reported under proposed Rule 3Cg-1? If not, why not? Are there clarifications or instructions the Commission could adopt that would be useful for parties seeking to invoke the

end-user clearing exception? If so, what are they and what would be the benefits of adopting them?

- Would it be difficult or prohibitively expensive for counterparties to report the information required under the proposed Rule 3Cg-1? If so, why?

- Should the Commission require more or less frequent notifications to the Commission than are currently contemplated by proposed Rule 3Cg-1? What other types of notifications should the Commission consider and what would be the potential frequency associated with such notifications? Are the requirements that the information provided under the proposal be accurate as of the date and time the information is provided to the SDR appropriate? Should the Commission consider any other time frame for accuracy of information? If so, what time frame should the Commission consider and what would be the advantages or disadvantages of such time frame?

- Should the Commission consider collecting more or less information than it has proposed to collect in connection with the Financial Obligation Notice? Is other information needed to achieve the purposes of the Dodd-Frank Act with respect to how an end-user meets its financial obligations or in order to prevent evasion of the end-user clearing exception? For example, is it necessary or appropriate for the Commission to collect:

- Additional information from that proposed regarding the credit support agreement and the collateral practices under the agreement, such as the level of margin collateral outstanding (e.g., less than or equal to a specified dollar amount, or greater than a series of progressively higher dollar amounts) or the frequency of portfolio reconciliation?

- Additional information from that proposed regarding the types of collateral provided (e.g., cash, government securities, other securities, other collateral) by an end-user and the effect of the liquidity of such collateral on the ability of the end-user to meet its financial obligations?

- Additional information from that proposed regarding specific terms of the credit support agreement, such as whether the collateral requirements are unilateral or bilateral provisions and whether there are contractual terms triggered by changes in the credit rating or other financial circumstances of one or both of the counterparties?

- Additional information from that proposed about the guarantor, such as whether or not the guarantor is a parent

seven entities are: (i) A swap dealer; (ii) a security-based swap dealer; (iii) a major swap participant; (iv) a major security-based swap participant; (v) an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3), but for paragraph (1) or (7) of subsection c of that Act (15 U.S.C. 80a-3(c)); (vi) a commodity pool; or (vii) a bank holding company with over \$50,000,000,000 in consolidated assets. See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(4)(B)). In addition, an affiliate, subsidiary, or wholly owned entity of a person that qualifies for an exception under Exchange Act Section 3C(g)(4)(A) and which is predominantly engaged in providing financing for the purchase or lease of merchandise or manufactured goods of the person shall be exempt from both the margin requirements described in Exchange Act Section 15F(e) and the clearing requirement in Exchange Act Section 3C(a), provided that the security-based swaps in question are entered into to mitigate the risk of the financing activities. See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(4)(C)).

³³ See *infra* notes 49-51 and accompanying text.

³⁴ For these purposes, a counterparty invoking the end-user clearing exception is considered by the Commission to be an issuer of securities registered under Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d) if it is controlled by a person that is an issuer of securities registered under Exchange Act Section 12 or required to file reports pursuant to Exchange Act Section 15(d). See Rule 1-02(x) of Regulation S-X, 17 CFR 210.1-02(x) (defining subsidiary for purposes of the financial statements required to be filed as part of registration statements under Section 12, and annual and other reports under Exchange Act Sections 13 and 15(d)).

³⁵ See Public Law 111-203, § 763(a) (adding Exchange Act Section 3C(i)). For these purposes, the Commission considers a committee to be appropriate if it is specifically authorized to review and approve the issuer's decisions to enter into security-based swaps).

³⁶ Exchange Act Section 3C(i) contemplates board review and approval of the decision to enter into the swap that is subject to the exemption. See Item 305 of Regulation S-K, 17 CFR 229.305.

³⁷ For example, a board resolution or an amendment to a board committee's charter could expressly authorize such committee to review and approve decisions of the reporting person not to clear the security-based swap being reported. In turn, such board committee also could adopt policies and procedures regarding the review and approval required by Exchange Act Section 3C(i), which may include periodic consideration of the relative costs, risk management characteristics and other features of cleared and non-cleared security-based swaps.

or affiliate of the person invoking the end-user clearing exception?

- Additional information from that proposed regarding the assets pledged, such as the type of security interest or the type of property being used as collateral?

- Additional information from that proposed regarding the segregation arrangements, such as the identity of the collateral agent or other third party involved in the arrangement, and information regarding whether the arrangement involves a custodial, tri-party or different type of relationship?

- Additional information from that proposed regarding the adequacy of other means being used, or the adequacy of the financial resources available, to meet the financial obligations associated with the non-cleared security-based swap?

- Additional information from that proposed regarding the review and approval by the appropriate committee of the SEC Filer's board or governing body of the issuer's decision to enter into the security-based swap subject to the end-user clearing exception, such as information provided to the committee and/or a summary of the policies and procedures used by the committee in practice?

- Are each of the terms used in Exchange Act Section 3C(g)(4) sufficiently clear to permit compliance with proposed Rule 3Cg-1 by affiliates invoking the end-user clearing exception? Should the Commission adopt more specific requirements to implement the provisions of Exchange Act 3C(g)(4)? Should the Commission provide further guidance on terms used in Exchange Act Section 3C(g)(4), such as the meaning of the term "predominantly engaged"? If so, what specific rules or guidance should the Commission consider and what would be the benefits of adopting them?

- Are the requirements of Exchange Act Section 3C(i) sufficiently clear to permit compliance with proposed Rule 3Cg-1 by parties invoking the end-user clearing exception? Should the Commission adopt more specific requirements to implement the provisions of Exchange Act 3C(i)? For example, should the Commission adopt provisions to specify the membership or other characteristics of the board committee, such as that a majority of the committee, or the entire committee, consist of independent directors? Should the Commission adopt provisions to clarify the steps that should be taken by board committees reviewing and approving an SEC Filer's decision to enter into security-based swaps subject to the end-user clearing

exception? If so, what specific rules should the Commission consider and what would be the benefits or disadvantages of adopting them? Should the review and approval contemplated by Exchange Act Section 3C(i) include a review and approval of the SEC Filer's decisions by a board committee (1) Composed of a majority of independent directors, (2) that has adopted procedures pursuant to which security-based swap transactions that are subject to the end-user clearing exception may be entered into by the company, which are reasonably designed to facilitate a risk management policy that has been approved by the board or an appropriate committee, (3) that makes and approves such changes to the policy as the committee deems necessary, and (4) determines no less frequently than quarterly that all security-based swap transactions entered into during the preceding quarter subject to the end-user clearing exception were effected in compliance with such procedures?³⁸ Are there other Commission rules concerning board approvals that may be useful models for the review and approval contemplated by Exchange Act Section 3C(i)?

- Is the meaning of the term "issuer of securities" as used in Exchange Act Section 3C(i) sufficiently clear? Is there a better alternative that the Commission should consider?

- Should the Commission consider requiring parties invoking the end-user clearing exception to report additional types of information, to limit the possibility for the exception to be abused or for other reasons? If so, what other information should be reported and what would be the benefit of requiring such information to be reported? What categories of information, if any, should not be required to be reported and why?

- Will some types of security-based swaps be more susceptible to abuse than others? For example:

- Are persons more or less likely to abuse the end-user clearing exception in connection with credit default swaps or equity swaps or when the underlying reference credit or security has certain characteristics?

- Are large or small companies or other identifiable sub-categories of counterparties to security-based swaps more or less likely to abuse the end-user clearing exception than other persons?

- Are there certain security-based swap products or counterparties that the Commission should monitor for abuse more closely than others?

³⁸ Cf., 17 CFR 270.17a-7(e) (Rule 17a-7(e) under the Investment Company Act of 1940).

If so, why?

- Are there different considerations for small companies or other identifiable categories of persons who may wish to invoke the end-user clearing exception? If so, what are they and how should the Commission take these considerations into account?

- Should the Commission consider requiring that a narrative statement be provided when an end-user employs means other than those described in proposed Rules 3Cg-1(a)(5)(i), (ii), (iii), or (iv) to meet its financial obligations?

3. Form of Notice to the Commission

Proposed Rule 3Cg-1(a) provides that a counterparty to a security-based swap that invokes the end-user clearing exception shall satisfy the notice requirements of Exchange Act Section 3C(g)(1)(C) by delivering or causing to be delivered the additional information specified in proposed Rule 3Cg-1(a) to a registered SDR or the Commission in the form and manner required for delivery of the information separately specified under proposed Rule 901(d) of Regulation SBSR.³⁹ Delivery of such information would also allow the information submitted pursuant to proposed Rule 3Cg-1(a) by the counterparty invoking the end-user clearing exception to be made available to the public by the SDR, to the extent required by proposed Regulation SBSR.⁴⁰ Under this approach, rather

³⁹ See Regulation SBSR Proposing Release, *supra* note 16. For each security-based swap transaction made in reliance on the end-user clearing exception, proposed Rule 901(d)(1)(ix) under Regulation SBSR requires parties to a security-based swap to indicate whether or not the end-user clearing exception is being invoked when reporting transaction information to an SDR as required by Exchange Act Section 13(m)(1)(F). Proposed Exchange Act Rule 901(a) under Regulation SBSR defines which of the parties to a security-based swap will be designated the Reporting Party for these purposes. The information required under proposed Exchange Act Rule 3Cg-1 would be in addition to these requirements but would be delivered to the SDR by the Reporting Party in the same manner as required by proposed Regulation SBSR. Regulation SBSR contemplates that information may be delivered to the Commission directly in limited circumstances when an SDR is not available. When permitted by Regulation SBSR, such delivery would also meet the end-user clearing exception notice requirement.

⁴⁰ See Regulation SBSR Proposing Release, at Section V, *supra* note 16, discussing public dissemination of security-based swap transaction information generally, including Exchange Act Section 13(m)(1)(B) (authorizing the Commission to make security-based swap transaction data available to the public to enhance price discovery) and Exchange Act Section 13(m)(1)(E)(iv) (requiring the Commission to consider whether public disclosure of security-based swap transaction data will materially reduce market liquidity). The Commission preliminarily believes information collected pursuant to proposed Rule 3Cg-1 would not be required to be publicly disseminated, but is

than collecting information through a separate process established by the Commission for these purposes, the information delivered in compliance with the requirements of proposed Rule 3Cg-1(a) and proposed Regulation SBSR would serve as the official notice of a security-based swap transaction made in reliance on the end-user clearing exception.

The Dodd-Frank Act requires all transactions in security-based swaps (whether cleared or non-cleared) to be reported to a registered SDR or the Commission.⁴¹ As centralized recordkeeping facilities of OTC derivatives transactions, SDRs are intended to play a critical role in enhancing transparency in the security-based swap markets. SDRs will enhance transparency by having complete records of security-based swap transactions, maintaining the integrity of those records, and providing effective access to those records to relevant authorities and the public in line with their respective information needs.⁴² The Commission recently proposed a series of new rules relating to the SDR registration process, duties, and core principles to ensure that SDRs operate in the manner contemplated by the Dodd-Frank Act.⁴³ The Commission also recently proposed Regulation SBSR to establish the standards that would

requesting comments on this point. *See infra* note 47 and accompanying text.

⁴¹ *See* Public Law 111-203, sec. 763(i) and sec. 766(a) (adding Exchange Act Sections 13(m)(1)(G) and 13A(A)(1), respectively).

⁴² In the case of non-cleared security-based swaps, each SDR is required to confirm with both parties to the security-based swap the accuracy of the data submitted to the SDR pursuant to Exchange Act Section 13(n)(5)(B), and both the parties to the security-based swap and the SDR have duties to correct errors in the data that may be identified under proposed Rules 905(a) (parties to the security-based swap) and 905(b) (SDRs) of Regulation SBSR. *See* Public Law 111-203, sec. 763(i) (adding Exchange Act Section 13(n)(5)(B)); Regulation SBSR Proposing Release, *supra* note 16. SDRs are required by Exchange Act Section 13(n)(5) (15 U.S.C. 78m(n)(5)) to have policies and procedures reasonably designed to protect the privacy of all transaction information received by the SDR, and the Commission recently proposed Rule 13n-9 to implement this requirement. *See* Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010) ("Regulation SDR Release"). Exchange Act Section 13A(c) requires each party to a non-cleared security-based swap to maintain records of the security-based swaps held by such party in the form required by the Commission, and Exchange Act Section 13A(d) mandates that these records must be in a form not less comprehensive than required to be collected by SDRs. *See* Public Law 111-203, sec. 766(a) (adding Exchange Act Sections 13A(c)-(d)). These records are available for inspection by the Commission and other specified authorities pursuant to Exchange Act Section 13A(c)(2) (Public Law 111-203, sec. 766(a) (adding Exchange Act Section 13A(c)(2))).

⁴³ *See* Regulation SDR Release, *supra* note 42.

apply when information is submitted to an SDR.⁴⁴

The Commission preliminarily believes collecting notice information for the end-user clearing exception through SDRs will support the development of straight through trade processing, help to reduce the administrative burdens of the notice requirement and assure the accuracy of the information collected.⁴⁵ Using the centralized facilities of SDRs should also make it easier for the Commission to analyze how the end-user clearing exception is being used, monitor for potentially abusive practices, and take timely action to address abusive practices if they were to develop.⁴⁶

Under proposed Regulation SBSR, and in particular proposed Rule 901(d), the information required to be reported to an SDR includes, if the security-based swap is not cleared, "whether the exception in Section 3C(g) of the Exchange Act was invoked." This information would then be included in the transaction report disseminated to the public under proposed Rule 902. Pursuant to proposed Rule 3Cg-1(a), however, the information required to be reported to an SDR would include more detailed information than simply whether Section 3C(g) was invoked—for example, under Rule 3Cg-1(a) the reportable information would include the identity of the counterparty relying on the clearing exception, and information regarding how that counterparty expects to meet its financial obligations. The Commission preliminarily believes that this additional information would either fall under the exception to public

⁴⁴ *See id.*

⁴⁵ *See id.* Exchange Act Sections 13(n) and 13A require parties to report transaction information to SDRs, confirm its accuracy and correct inaccuracies. *See* Public Law 111-203, sec. 763(i) (adding Exchange Act Section 13(n)); Public Law 111-203, sec. 766(a) (adding Exchange Act Section 13A). The Commission preliminarily believes these requirements create sufficient assurance to consider the transaction records collected by SDRs reliable for use in connection with regulatory decisions, and therefore the Commission preliminarily believes the records should also be considered reliable for purposes of the notice requirement under Exchange Act Section 3C(g). Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)).

⁴⁶ The proposed notification method is supported by the recordkeeping requirements under Exchange Act Section 13A, which will permit the Commission to review transaction information and take such action as may be necessary to prevent abuses of the end-user clearing exception. *See* Public Law 111-203, sec. 766(a) (adding Exchange Act Section 13A). Such Commission action would be taken in a manner consistent with our review practices for other transaction information submitted to SDRs, rather than through a separate process developed for these purposes, thereby helping to maintain consistency of regulatory action in comparable areas.

dissemination contained in proposed Rule 902(c)(2),⁴⁷ or otherwise should be excluded from the publicly-disseminated transaction report. Thus, the only information collected pursuant to Rule 3Cg-1 that would be disseminated publicly is "whether the exception to Section 3C(g) of the Exchange Act was invoked."

Request for Comment

The Commission generally requests comments on all aspects of proposed Rule 3Cg-1. Additionally, the Commission requests comments on the following specific issues:

- Is it appropriate for the Commission to require notification regarding use of the end-user clearing exception to be made through SDRs? Should notifying the Commission necessarily involve direct conveyance of the information to the Commission rather than delivery through an SDR? What are the advantages or disadvantages of the Commission's proposal?
- Does collecting Financial Obligation Notice information through SDRs interfere with the ability of non-financial entities to use the end-user clearing exception in any way? Are SDRs reliable enough to be used for these purposes? Are the services provided by SDRs reasonably available to non-financial entities?
- Is Financial Obligation Notice information different from other information proposed to be collected by SDRs in some respect that makes use of SDRs for these purposes inappropriate? If so, how is the notice information different and why is it inappropriate to use SDRs to collect the information?
- Would it be preferable to require notice of use of the end-user clearing exception to be given through the Commission's EDGAR system on a newly developed EDGAR form?⁴⁸ What would be the advantages or disadvantages of using the EDGAR system? For example:
 - Do parties intending to invoke the end-user clearing exception anticipate any benefits or burdens of filing an EDGAR form electronically that should be considered?

⁴⁷ Proposed Rule 902(c)(2) of Regulation SBSR would prohibit disclosure of any information disclosing the business transactions and market positions of any person with respect to a security-based swap that is not cleared. *See supra* note 16 (citing Regulation SBSR Proposing Release).

⁴⁸ *See* EDGAR Filer Manual, Volume I: "General Information" Version 8 (Sept. 2009), incorporated by reference into the Code of Federal Regulations (Release Nos. 33-9058, 34-60390, 39-2466, IC-28838, July 28, 2009); EDGAR Filer Manual, Volume II: "EDGAR Filing," Version 15 (Aug. 2010), incorporated by reference into the Code of Federal Regulations (Release Nos. 33-9140; 34-62873; 39-2471; IC-29413, Sept. 9, 2010).

○ Is the EDGAR system likely to be familiar to all entities invoking the end-user clearing exception? Will small companies or other identifiable categories of persons face different burdens or advantages than others when using the EDGAR system?

○ Should the Commission require persons invoking the end-user clearing exception to submit notice to the Commission on an EDGAR form in addition to the information collected through SDRs? Would collecting information in both ways significantly aid the Commission's efforts to prevent abuse of the end-user clearing exception or have other benefits that should be considered by the Commission? Would doing so create significant additional burdens for persons invoking the end-user clearing exception?

• Other than the alternative of using the Commission's EDGAR system, are there other methods that the Commission should consider for receiving notification regarding the use of the end-user clearing exception? For example, could the information submitted to an SDR also be dually submitted to Commission in some form? If so, what are the possible alternatives and what advantages or disadvantages would they have?

• Do the Exchange Act and the associated rules and proposed rules regulating SDRs and parties to security-based swaps create sufficient assurance that notice information collected through SDRs will be accurate? Are there additional protections the Commission should establish to create greater assurance that the notice information collected will be accurate? If so, what are they and how will they improve the information collection process?

• Would the person reporting information to the SDR be in a position to know, in all cases, the information the Commission is requiring to be reported under proposed Rule 3Cg-1(a)? If not, why not? Are representations and warranties and similar established market practices associated with documenting security-based swap transactions adequate to ensure the person reporting information to the SDR can obtain the information required to be reported under proposed Rule 3Cg-1?

• Should the Commission consider more or less frequent reporting of the information required by Rule 3Cg-1(a)? How frequently will the information required to be reported be expected to change? Would alternatives to proposed Rule 3Cg-1 such as the collection of periodic reports or updates of general notifications to the Commission be

sufficient to achieve the purposes of Exchange Act Section 3C(g)? If so, what are the possible alternatives and what advantages or disadvantages would they have?

• How long would it be expected to take for the person reporting information to the SDR to gather the information required under proposed Rule 3Cg-1(a)? Will the time needed to gather the required information disrupt the transaction process for security-based swaps to any material extent?

• Should the Commission require persons invoking the end-user clearing exception to follow additional compliance practices in some circumstances? For example:

○ Should the Commission require persons invoking the end-user clearing exception to create additional records of the means being used to mitigate the credit risk of the security-based swap as contemplated by proposed Rule 3Cg-1(a)(5) and maintain such record in the manner required by Exchange Act Section 13A(d)?

○ Should the Commission require persons invoking the end-user clearing exception to file materials referred to in proposed Rule 3Cg-1(a)(5) with the Commission? Why or why not?

○ Should the Commission require persons invoking the end-user clearing exception to establish any other additional compliance practices? If not, why not? If so, what should those practices be and what would be the advantages and disadvantages of adopting such a requirement?

• Will collecting notice information together with other transaction information have the advantages expected by the Commission? For example, will analyzing information regarding use of the end-user clearing exception by product type and other transaction characteristics help to promote market efficiency or inform future Commission rulemaking? Are there other advantages or disadvantages related to collecting notice information through SDRs that the Commission should consider? If so, what are they?

• Does collecting notice information regarding use of the end-user clearing exception through SDRs create significantly greater burdens or advantages for some parties to security-based swaps compared to others? For example, will parties who frequently transact security-based swaps face higher or lower burdens or advantages compared to parties that enter into security-based swap transactions less frequently? Will parties who enter into both cleared and non-cleared security-based swaps face different burdens or advantages in comparison to parties

who enter into only cleared security-based swaps or only non-cleared security-based swaps? Will small companies face different burdens than large companies? If so, what steps should the Commission consider taking to account for these differences? Given that certain efficiencies may arise from conducting frequent transactions in security-based swaps, are the additional burdens that may be faced by small companies or non-financial entities that enter into security-based swaps infrequently unique to the proposed rule or do they principally reflect the nature of the security-based swaps market and the nature of the transacting party? Are there benefits from collecting notice information that should also be considered?

• Should any or all of the information required to be reported to an SDR pursuant to proposed Rule 3Cg-1(a) be publicly disseminated? Should public dissemination be limited only to the fact that Exchange Act Section 3C(g) was invoked? Are there any changes to the proposed rules the Commission should consider regarding public dissemination? If publicly disclosed, how would market participants, academics and other members of the public expect to use such information and what are the potential benefits or costs of such uses? Would additional information be useful? What information, if any, included in proposed Rule 3Cg-1(a) would raise concerns for end-users if made public after the end-user elected to use the exception? How would the public interest be better served by keeping information relating to the end-user clearing exception in or out of the public domain?

• If restrictions on public dissemination of the information are in place, should the Commission consider permitting such dissemination after the lapse of a certain period of time? If so, should all or only a subset of the information be disseminated? What would be an appropriate time period for a delay in dissemination? How would the analysis of whether the public interest would be better served by keeping information relating to the end-user clearing exception in or out of the public domain change based on whether there is a delay in such dissemination?

• Should information regarding whether the end-user clearing exception was invoked that is collected pursuant to proposed Rule 3Cg-1(a) be made available to the public through the SDR or through new processes established by the Commission? What would be the advantages and disadvantages of either approach?

B. Hedging or Mitigating Commercial Risk

To apply the end-user clearing exception, Exchange Act Section 3C(g)(1)(B) requires a non-financial entity to determine whether it uses security-based swaps to hedge or mitigate commercial risk.⁴⁹ The phrase “hedging or mitigating commercial risk” is itself the subject of current joint rulemaking by the Commission and the CFTC. The Commission and the CFTC recently proposed a definition of “hedging or mitigating commercial risk” under proposed Exchange Act Rule 3a67–4 that the Commission preliminarily believes should also govern the meaning of “hedging or mitigating commercial risk” for purposes of Exchange Act Section 3C(g)(1)(B).⁵⁰ The Commission preliminarily believes this approach should ensure consistency of

⁴⁹ See Public Law 111–203, sec. 763(a) (adding Exchange Act Section 3C(g)(1)(B)).

⁵⁰ See Definitions Proposing Release, *supra* note 3. Persons wishing to comment on the definition of “hedging or mitigating commercial risk” should submit comments pursuant to the Definitions Proposing Release. For reference, proposed Exchange Act Rule 3a67–4(a) reads as follows:

“Hedging or mitigating commercial risk

For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67) and § 240.3a67–1 of this chapter, a security-based swap position shall be deemed to be held for the purpose of hedging or mitigating commercial risk when:

(a) Such position is economically appropriate to the reduction of risks that are associated with the present conduct and management of a commercial enterprise, or are reasonably expected to arise in the future conduct and management of the commercial enterprise, where such risks arise from:

(1) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(2) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or

(3) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise;

(b) Such position is:

(1) Not held for a purpose that is in the nature of speculation or trading;

(2) Not held to hedge or mitigate the risk of another security-based swap position or swap position, unless that other position itself is held for the purpose of hedging or mitigating commercial risk as defined by this section or 17 CFR § 1.3(ttt); and

(c) The person holding the position satisfies the following additional conditions:

(1) The person identifies and documents the risks that are being reduced by the security-based swap position;

(2) The person establishes and documents a method of assessing the effectiveness of the security-based swap as a hedge; and

(3) The person regularly assesses the effectiveness of the security-based swap as a hedge.”

interpretation across the Exchange Act provisions for which this concept is relevant and provide assurance of fair and equivalent treatment for similarly situated parties in a wide variety of circumstances.⁵¹

Request for Comment

The Commission generally requests comments on all aspects of proposed Rule 3Cg–1. Additionally, the Commission requests comments on the following specific issues:

- Are there reasons to believe that the proposed joint rulemaking by the Commission and the CFTC to define the meaning of certain terms used in the Exchange Act may affect the availability of the end-user clearing exception? If so, what specifically are the affects expected and what concerns do they raise?

- Are there further distinctions or clarifications that should be made by the Commission for purposes of the end-user clearing exception that are different from those being made in connection with the proposed joint rulemaking by the Commission and the CFTC? If so, what are they and what would be the benefits of adopting them?

- Are there technical requirements or details associated with terms used in the definition of “financial entity” in Exchange Act Section 3C(g)(3) that may have unexpected consequences when used in connection with the end-user clearing exception? Are there aspects of the CEA, the Investment Advisers Act of 1940 (15 U.S.C. 80), the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002), or the Bank Holding Company Act of 1956 (12 U.S.C. 184) that are incorporated in the definition that may need to be taken into consideration by the Commission to ensure the end-user clearing exception is available in appropriate circumstances? If so, what specific changes should the Commission

⁵¹ The Commission notes that certain portions of proposed Rule 3a67–4 would be either inapplicable to, or would need to be interpreted in light of, the circumstances surrounding the end-user clearing exception. For example, subparagraph 3a67–4(c)(3) of the proposed Rule requires that a person regularly assess the effectiveness of the security-based swap as a hedge. Given that persons must determine whether the end-user clearing exception is available at the time the security-based swap is first confirmed, this portion of proposed Rule 3a67–4 is inapplicable for purposes of Exchange Act Section 3C(g)(1)(B). In addition, proposed Rule 3a67–4 does not contemplate applying the definition of hedging or mitigating commercial risk to affiliates. Exchange Act Section 3C(g)(4) creates certain additional requirements for affiliates of non-financial entities seeking to invoke the end-user clearing exception, and these requirements must also be satisfied for the end-user clearing exception to be available.

consider and what would be the benefits of adopting them?

- Should the Commission consider adopting a separate definition of “hedging or mitigating commercial risk” specifically designed to address the circumstances of the end-user clearing exception? If so, what are the specific considerations associated with the end-user clearing exception that make a separate rule desirable? What features would such a rule need in order to be effective and what would be the benefits of adopting them?

- Should the Commission consider limiting or broadening the definition of “hedging or mitigating commercial risk” as it applies to the end-user clearing exception? For example, should security-based swaps subject to the end-user clearing exception be required to hedge or mitigate commercial risk on a single risk or an aggregate risk basis, and/or on a single entity or a consolidated basis? Are more specific industry-specific rules on hedging or rules that apply only to certain categories of asset classes appropriate at this time? Should security-based swaps facilitating asset optimization or dynamic hedging be included? Why or why not? Commenters are requested to discuss both the policy and legal bases underlying such comments.

- If an entity is designated as a swap dealer, security-based swap dealer, major swap participant or major security-based swap participant only for some of its swaps or security-based swaps, should it be treated as a financial entity under Exchange Act Section 3C(g)(3) and thereby be disqualified from invoking the end-user clearing exception for all of its security-based swaps? If so, why? If not, should the Commission require security-based swap dealers and major security-based swap participants in that position to separate or otherwise keep distinct those security-based swap activities for which they are designated as a security-based swap dealer or major security-based swap participant from their other security-based swap activities? If so, how? If not, why not?

III. Required Consideration of a Clearing Exemption for Small Banks, Savings Associations, Farm Credit System Institutions and Credit Unions

Mandatory clearing of security-based swaps is a central part of the reforms enacted by the Dodd-Frank Act and generally applies to financial entities without regard to size. However, Section 3C(g)(3)(B) of the Exchange Act requires the Commission to consider whether to exempt small banks, savings associations, farm credit systems

institutions and credit unions from the Exchange Act's definition of "financial entity", including specifically those with total assets of \$10,000,000,000 or less ("Identified Financial Institutions").⁵² The advantages and disadvantages associated with mandatory clearing may be different with respect to certain types of financial entities and the Commission is required to consider whether such differences warrant granting an exemption for Identified Financial Institutions.⁵³

The Identified Financial Institutions may use security-based swaps, and other derivatives to hedge or mitigate their business risks in ways that may be directly related to the business of banking. Under the definition of "financial entity" in the Dodd-Frank Act, however, these institutions would not qualify to use the end-user clearing exception unless further action is taken by the Commission. Depending on the extent to which an Identified Financial Institution relies on security-based swaps to manage its risk, the lack of an end-user exception could limit the availability, or raise associated initial costs, of security-based swaps for that institution.

Alternatively, providing a blanket carve-out from the clearing requirement, albeit in connection with hedging transactions, for a class of financial entities could undercut the statutory goal of greater centralized clearing and the related benefits of efficiency and transparency. The Commission preliminarily does not believe that Identified Financial Institutions transact in securities-based swaps for hedging purposes in significant volume, but is requesting comments on this point. The Commission would also be interested in commenters' views on the practical impact of either permitting or prohibiting Identified Financial Institutions from using the end-user exception to effect securities-based swaps transactions, and how narrowly or broadly any exemption should be structured.⁵⁴

In accordance with Section 3C(g)(3)(B) of the Exchange Act and taking the above considerations into account, the Commission is proposing alternative additional rule text under consideration in proposed Rules 3Cg-1(b) and (c) to exclude from the definition of "financial entity" those banks, savings associations, farm credit systems institutions and credit unions with total assets of \$10 billion or less falling within the definition of "financial entity" solely because of Section 3C(g)(3)(A)(viii) of the Exchange Act. The Commission preliminarily believes it would be appropriate to consider an alternative that contains an exemption for such entities at the \$10 billion total assets threshold because it would be consistent with the consideration contemplated in Section 3C(g)(3)(B) of the Exchange Act and because it may include financial institutions in the relevant categories that may face difficulties in meeting the burdens associated with a mandatory clearing requirement due to their limited operations or infrequent use of security-based swaps.

Specifically, the alternative language would apply to a bank, as defined in Section 3(a)(6) of the Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1831), the deposits of which are insured by the Federal Deposit Insurance Commission; a farm credit system institution chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001); or an insured Federal credit union, State credit union or State-chartered credit union under the Federal Credit Union Act (12 U.S.C. 1752) falling within the definition of "financial entity" solely because of Section 3C(g)(3)(A)(viii) of the Exchange Act. The exemption would not be available to any institution that falls into any of the other seven categories specified in Exchange Act Section 3C(g)(3) for any reason. The \$10 billion total asset threshold for these entities would be measured by reference to the total assets of the institution on the last day of the most recent fiscal year. The Commission believes it would be appropriate to consider such time frame for measurement of the \$10 billion threshold in order to balance the need

to maintain an updated assessment of the total asset threshold and the need to avoid frequently monitoring the ability to make use of the exemption.

Request for Comment

The Commission generally requests comments on all aspects of proposed Rule 3Cg-1. In addition, to inform our consideration of whether it would be appropriate for the Commission to provide an exemption for Identified Financial Institutions, the Commission requests comments on the following specific issues:

- Should the Commission grant an exemption from mandatory clearing requirements for Identified Financial Institutions? Would it be better for the Commission to simply require Identified Financial Institutions to follow the same clearing requirements as other financial entities? Why or why not?

- Is the proposed alternative language in proposed Rules 3Cg-1(b) and (c) sufficiently clear to allow Identified Financial Institutions to assess whether or not they would qualify to use the alternative proposed end-user clearing exception? Why or why not? If not, what steps could the Commission take to make the standards more clear and what would be the advantages or disadvantages of the alternative approach?

- How significant are the aggregated activities of Identified Financial Institutions to the security-based swap market currently? Do the activities of such institutions have a material effect on the pricing of swaps, or contribute to an understanding of the security-based swap market? What is the aggregate gross exposure of security-based swaps held by Identified Financial Institutions? How would these activities and exposures change if such institutions were excluded from the mandatory clearing requirement? Is it possible that the activities of such institutions could change in a way such that they could have an effect on the pricing of security-based swaps if they are excluded from the mandatory clearing requirement? If so, what would be the effect on pricing of security-based swaps?

- What types of security-based swap transactions do Identified Financial Institutions enter into and why? Are any risks presented by these types of transactions adequately addressed through the regulatory controls and business practices of Identified Financial Institutions? Should the Commission consider treating different types of security-based swaps differently when considering whether the end-user clearing exception is

⁵² See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(3)(B)).

⁵³ See Dodd-Lincoln Letter, *supra* note 23.

⁵⁴ See S. Rep. No. 111-176, at 34 (2010) (Report of the Senate Committee on Banking, Housing, and Urban Affairs regarding The Restoring American Financial Stability Act of 2010 discussing the end-user clearing exception and exceptions from bilateral reporting, capital and margin requirements, and stating that "Some parts of the OTC market may not be suitable for clearing and exchange trading due to individual business needs of certain users. Those users should retain the ability to engage in customized, uncleared contracts while bringing in as much of the OTC market under the centrally cleared and exchange-traded framework as possible. Also, OTC (contracts not cleared centrally) should still be subject to

reporting, capital, and margin requirements so that regulators have the tools to monitor and discourage potentially risky activities, except in very narrow circumstances. These exceptions should be crafted very narrowly with an understanding that every company, regardless of the type of business they are engaged in, has a strong commercial incentive to evade regulatory requirements.")

available for Identified Financial Institutions? If so, what specific distinctions should be considered by the Commission and what would be the advantages and disadvantages of adopting them?

- Would there be any benefit for Identified Financial Institutions in receiving an exemption taking into account their anticipated activity in the security-based swap market? What would be the potential effects of granting an exemption for Identified Financial Institutions? What would be the effect on the security-based swap market? What would be the effect on the goals of promoting central clearing and reducing systemic risk?

- If an exemption permitting Identified Financial Institutions to use the end-user clearing exception were to be adopted, should the Commission consider limiting the availability of the end-user clearing exception to only some of the financial institutions identified in Exchange Act Section 3C(g)(3)(B)? Are there differences in the supervisory regimes applicable to banks, savings associations, farm credit institutions and credit unions that create material substantive differences between such institutions that are relevant for these purposes? If so, what specific distinctions should be considered by the Commission and what would be the benefits of adopting them?

- Do Identified Financial Institutions commonly enter into security-based swaps? Would such institutions' behavior in respect of security-based swaps change if the end-user exception was extended or not extended to include them?

- What would be the possible consequences of not proposing an exemption on the banking activities and operational practices of Identified Financial Institutions? Would the absence of an exemption prevent Identified Financial Institutions from providing or increase the costs of providing certain types of financial services to their customers or require them to make additional investments? If so, how? What types of services and what types of customers might be impacted? What types of investments might be required? Would the expected impact be justified by the systemic or other benefits of requiring mandatory clearing?

- Is the \$10,000,000,000 total asset threshold an appropriate point for the Commission to use when defining the availability of a clearing exception for Identified Financial Institutions? Should the threshold be lower? Should the threshold be higher? Is there a

measure other than total assets, or a more precise definition of total assets, that should be used for these purposes, and if so, what would be the benefit of adopting the alternative measure?

- What would be an appropriate frequency for measuring compliance with the \$10,000,000,000 total asset threshold for entities? Is the proposed time frame too long or too short? If so, why? Are there any difficulties in measuring or monitoring such threshold? Would Identified Financial Institutions generally measure and monitor such thresholds as part of their normal business practices?

IV. General Request for Comments

The Commission is requesting comments from all members of the public. The Commission will carefully consider the comments that it receives. The Commission seeks comment generally on all aspects of the proposed rule. In addition, the Commission seeks comment on the following:

1. Should the Commission clarify or modify any of the definitions included in the proposed rules? If so, which definitions and what specific modifications are appropriate or necessary?
2. Are the obligations in the proposed rule sufficiently clear? Is additional guidance from the Commission necessary?
3. What are the technological or administrative burdens of complying with the rule proposed by the Commission? Does the method of collecting information contained in the proposed rule offer any technological or administrative advantages in comparison to other possible methods?
4. Should the Commission implement substantive requirements in addition to, or in place of, the requirements in the proposed rule?

In addition, the Commission seeks commenters' views regarding any potential impact of the proposal on non-financial entities expecting to invoke the end-user clearing exception, SDRs, other market participants, and the public generally. The Commission seeks comments on the proposal as a whole, including its interaction with the other provisions of the Dodd-Frank Act. The Commission seeks comments on whether the proposals would help achieve the broader goals of increasing transparency and accountability in the OTC derivatives market.

The Commission requests comment generally on whether its proposed actions today to govern the exception to mandatory clearing of security-based swaps available under Exchange Act Section 3C(g) are necessary or

appropriate for those purposes. If commenters do not believe the provisions of the proposed rule are necessary and appropriate, why not? What would be the preferred action?

Title VII requires that the SEC consult and coordinate to the extent possible with the CFTC for the purposes of assuring regulatory consistency and comparability, to the extent possible, and states that in adopting rules, the CFTC and SEC shall treat functionally or economically similar products or entities in a similar manner.

The CFTC is proposing rules related to an exception to mandatory clearing of swaps as required under Section 723(a) of the Dodd-Frank Act. Understanding that the Commission and the CFTC regulate different products and markets, and as such, appropriately may be proposing alternative regulatory requirements, we request comments on the impact of any differences between the Commission and CFTC approaches to the regulation of swap data repositories and SDRs, respectively. Specifically, do the regulatory approaches under the Commission's proposed rulemaking pursuant to Section 763(a) of the Dodd-Frank Act and the CFTC's proposed rulemaking pursuant to Section 723(a) of the Dodd-Frank Act result in duplicative or inconsistent efforts on the part of market participants subject to both regulatory regimes or result in gaps between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized? Do commenters believe the approaches proposed by the Commission and the CFTC to govern the end-user clearing exception to mandatory clearing of security-based swaps and swaps are comparable? If not, why? Do commenters believe there are approaches that would make the end-user clearing exceptions for security-based swaps and swaps more comparable? If so, what are they and what would be the benefits of adopting such approaches? Do commenters believe that it would be appropriate for us to adopt an approach proposed by the CFTC that differs from our proposal? If so, which one?

Commenters should, when possible, provide the Commission with empirical data to support their views. Commenters suggesting alternative approaches should provide comprehensive proposals, including any conditions or limitations that they believe should apply, the reasons for their suggested approaches, and their analysis regarding why their suggested approaches would satisfy the statutory mandate contained in Section 763(a) of the Dodd-Frank Act

governing the exception to mandatory clearing of security-based swaps.

V. Paperwork Reduction Act Analysis

Proposed Rule 3Cg-1

Proposed Rule 3Cg-1 Notice to the Commission [and Financial Entity Exemption] contains “collection of information” requirements within the meaning of the Paperwork reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The Commission has submitted it to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title of the new collection of information under proposed Rule 3Cg-1 under the Exchange Act is “Rule 3Cg-1 Notice to the Commission [and Financial Entity Exemption].” OMB has not yet assigned a control number for the new collection of information contained in proposed Rule 3Cg-1 under the Exchange Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

A. Summary of Collection of Information

Proposed Rule 3Cg-1(a) under the Exchange Act would require a counterparty to a security-based swap transaction to meet the requirements of Exchange Act Section 3C(g)(1)(C) by delivering certain specified items of information to an SDR in the manner required by proposed Regulation SBSR.⁵⁵ Whenever the end-user clearing exception is invoked, ten additional items of information would be required to be produced. If the counterparty invoking the end-user clearing exception is also an issuer of securities under Exchange Act Section 12 or required to file periodic reports with the Commission pursuant to Exchange Act Section 15(d) then two additional items of information would also be required for a total of twelve items of information required to be produced. In either case, this additional information collected in the form and manner required by Regulation SBSR would serve as the

official notice to the Commission of a security-based swap transaction that is made in reliance on the end-user clearing exception.⁵⁶

B. Proposed Use of Information

The collection of information in proposed Rule 3Cg-1(a) serves two purposes contemplated by the Dodd-Frank Act. First, the proposed Rule identifies what a party to a security-based swap transaction must do to satisfy the statutory requirement in Exchange Act 3C(g)(1)(C) to provide notice to the Commission if it invokes the end-user clearing exception.⁵⁷ Second, the Commission expects the empirical data collected under Rule 3Cg-1(a) will aid efforts to prevent abuse of the end-user clearing exception by allowing it to evaluate how the end-user clearing exception is being used, identify areas of potential concern and take prompt action to limit abuses in appropriate circumstances.⁵⁸

C. Respondents

The proposed collection of information in proposed Rule 3Cg-1(a) would apply to transactions that qualify for the end-user clearing exception under Exchange Act Section 3C(g)(1) where at least one of the parties to the security-based swap is not included in the definition of financial entity and is using the security-based swap to hedge or mitigate commercial risk. For an entity to determine whether it is not a financial entity and whether it is using the security-based swap transaction to hedge or mitigate commercial risk, the party must first make an assessment under the applicable definition of financial entity in Exchange Act Section 3C(g)(3)⁵⁹ and then consider whether the definition of hedging or mitigating commercial risk in proposed Rule 3a67-4 applies to the security-based swap in question.⁶⁰ In addition, those entities that may be considered Identified Financial Institutions and therefore fall within the exemption under the proposed alternative language in Rule 3Cg-1(b) and (c) would be required to conduct an assessment under the proposed alternative language to determine whether they are entitled to elect to use the end-user clearing exception.

Based on the information currently available to the Commission, the Commission preliminarily estimates there are roughly 5,000 entities in the credit default swaps marketplace.⁶¹ The Commission preliminarily estimates that 1,000 of these entities regularly participate in the market for credit default swaps and other security-based swaps to an extent that may lead them to be reporting persons for purposes of proposed Regulation SBSR. In addition, the Commission estimates that there may be up to another 4,000 security-based swap counterparties⁶² that transact security-based swaps much less frequently.⁶³ The Commission preliminarily believes the 1,000 regular participants in the security-based swaps market are likely to be entities that are financial entities for purposes of the Dodd-Frank Act and would therefore not qualify for the end-user clearing exception, while the 4,000 less frequent counterparties to security-based swaps could, for purposes of the end-user clearing exception, be non-financial entities using security-based swaps to hedge or mitigate commercial risk. These 4,000 counterparties are also preliminarily believed by the Commission to include Identified Financial Institutions using security-based swaps.⁶⁴ Accordingly, with respect to burdens applicable to all security-based swap counterparties that qualify for the end-user clearing exception, the Commission preliminarily believes that it is reasonable to use the figure of 4,000 respondents for purposes of estimating collection of information burdens under the PRA.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

The Commission preliminarily believes the notification required by proposed Rule 3Cg-1⁶⁵ imposes a limited reporting or recordkeeping burden, because it references commonly used market practices when defining whether a security-based swap hedges

⁶¹ See Regulation SBSR Proposing Release, *supra* note 16.

⁶² *Id.*

⁶³ This figure is based on the 5,000 total participants in the security-based swap market minus the 1,000 of those participants that qualify as financial entities.

⁶⁴ For purposes of the discussion that follows, the term “non-financial entities” includes Identified Financial Institutions that would be excluded from the definition of “financial entity” in Exchange Act Section 3C(g)(3) in the event the proposed alternative language in Rules 3Cg-1(b) and (c) is adopted by the Commission.

⁶⁵ For purposes of the discussion that follows, references to proposed Rule 3Cg-1 are to proposed Rule 3Cg-1 including the alternative proposed rule text, unless otherwise noted.

⁵⁵ See *supra*, notes 21–37 and accompanying text. Proposed Regulation SBSR would specify who reports security-based swap transactions, where such transactions are to be reported, what information is to be reported, and in what format. The information required under proposed Exchange Act Rule 3Cg-1 would be in addition to these requirements but would be delivered to the SDR by the Reporting Party in the same manner as required by proposed Regulation SBSR. Regulation SBSR contemplates that information may be delivered to the Commission directly in limited circumstances when an SDR is not available. When permitted by Regulation SBSR, such delivery would also meet the end-user clearing exception notice requirement.

⁵⁶ See Public Law 111–203, sec. 763(a) (adding Exchange Act Section 3C(g)(1)(C)).

⁵⁷ *Id.*

⁵⁸ See Public Law 111–203, sec. 763(a) (adding Exchange Act Section 3C(g)(6)).

⁵⁹ See Public Law 111–203, sec. 763(a) (adding Exchange Act Section 3C(g)(3)(A)(i)–(viii)).

⁶⁰ See Definitions Proposing Release, *supra* note 3.

or mitigates commercial risk⁶⁶ and utilizes the proposed reporting and recordkeeping mechanism under Rule 901 of Regulation SBSR to meet the notice requirement contemplated by Exchange Act Section 3C(g)(1)(C).⁶⁷ Under proposed Rule 3Cg-1 the additional reporting burden on the party invoking the end-user clearing exception would be to identify and document the commercial risk being hedged and the effectiveness of the proposed security-based swap as a hedge, and then complete ten or, at the most, twelve additional data points in a larger set of transaction information that would be required to be submitted to an SDR or the Commission under proposed Regulation SBSR. In addition, those entities that may be considered Identified Financial Institutions and therefore fall within the exemption under the proposed alternative language in Rule 3Cg-1(b) and (c) would be required to conduct an assessment under the proposed alternative language to determine whether they are entitled to elect to use the end-user clearing exception. The recordkeeping burden on the SDR would also be limited to storing the additional ten or twelve data points in the larger set of transaction information separately required to be delivered pursuant to proposed Regulation SBSR.

1. Estimated Number of Security-Based Swap Transactions

According to publicly available data from the Depository Trust Clearing Corporation ("DTCC") recently, there have been an average of approximately 20,000 new transactions in single-name credit default swap ("CDS") transactions per day,⁶⁸ corresponding to a total number of CDS transactions of approximately 5,200,000 per year.⁶⁹ The

Commission preliminarily believes that CDS represent 85% of all security-based swap transactions.⁷⁰ Accordingly, and to the extent that historical market activity is a reasonable predictor of future activity,⁷¹ the Commission preliminarily estimates that the total number of security-based swap transactions that would be subject to proposed Rule 3Cg-1 on an annual basis would be approximately 6,200,000.⁷²

Based on publicly available information and consultation with industry sources, the Commission preliminarily believes that even the most active non-financial entity participants in the security-based swap market enter a relatively small number of new security-based swaps during any given period.⁷³ There are approximately 4,000 participants in the security-based swap marketplace that the Commission preliminarily believes could qualify for the end-user clearing exception and they represent approximately 80% of the total number of participants in the security-based swap market.⁷⁴ However, based on all information reviewed the Commission preliminarily estimates that non-financial entities account for 1% of all security-based swap transactions.⁷⁵

2. Reporting and Recordkeeping Burdens

To qualify for the end-user clearing exception proposed Rule 3Cg-1(a)(4) would require a non-financial entity to

determine whether the terms of the proposed security-based swap and the manner in which it will be used satisfy the definition of hedging or mitigating commercial risk established by proposed Exchange Act Rule 3a67-4. To meet the requirements of the definition, subsection 3a67-4(a)(3) of proposed Rule 3a67-4 specifies that the counterparty to the security-based swap must identify and document one or more risks associated with the present or future conduct and management of the enterprise that are being reduced by the security-based swap and establish and document a method of assessing the effectiveness of the security-based swap as a hedge for such identified risks. In complying with proposed Rule 3a67-4, non-financial entities seeking to invoke the end-user clearing exception would need to establish and maintain an appropriate compliance mechanism including the necessary professional, legal, technical and administrative support to make and document the required assessment of hedging effectiveness.⁷⁶

The Commission preliminarily believes that counterparties transacting in security-based swaps to hedge commercial risks ordinarily will have established risk management or financial control systems in place for other reasons which will likely be adjusted to accommodate the requirements of proposed Rule 3a67-4(a)(3).⁷⁷ Accordingly, the Commission preliminarily estimates that designing and implementing an appropriate compliance and support program to estimate the hedging effectiveness of security-based swaps would impose an initial one time aggregate burden of approximately 44,000 hours, corresponding to 11 burden hours for

⁶⁶ See Definitions Proposing Release, *supra* note 3.

⁶⁷ See Regulation SBSR Proposing Release, *supra* note 16.

⁶⁸ See, e.g., "Table 17: Summary of Weekly Transaction Activity," http://www.dtcc.com/products/derivserv/data_table_iii.php (weekly data as updated by DTCC).

⁶⁹ *Cf.*, Regulation SBSR Proposing Release, *supra* note 16, which used an estimate of 36,000 transactions in single name CDS transactions per day, referencing the same DTCC data. The difference is accounted for by differences in the scope of proposed Rule 3Cg-1 compared to proposed Regulation SBSR. Proposed Regulation SBSR encompasses both new transactions in security-based swaps and certain transactions occurring during the lifecycle of security-based swaps and therefore both of these elements are taken into account for purposes of its discussion of estimated burdens to be experienced by respondents as a result of the proposed regulation. Proposed Rule 3Cg-1 would only affect new transactions and therefore the estimated number of transactions used for purposes of the burden calculations is limited to new transactions.

⁷⁰ The Commission's estimate is based on internal analysis of available security-based swap market data. The Commission is seeking comment about the overall size of the security-based swap market.

⁷¹ The Commission notes that regulation of the security-based swap markets, including by means of proposed Regulation SBSR and proposed Rule 3Cg-1, could impact market participant behavior.

⁷² This figure is based on the following: $(5,200,000/0.85) = 6,117,647$.

⁷³ Information from ISDA surveys relating to collateralized swap transactions indicate that the average number of outstanding OTC derivative trades for non-bank firms generally average just 1% of all transactions in the marketplace, and this figure includes transactions associated with certain parties not entitled to invoke the end-user clearing exception, such as certain major swap participants, commodity pools as defined in section 1a(10) of the Commodity Exchange Act and private funds as defined in section 202(a) of the Investment Advisers Act of 1940. See ISDA Collateral Committee, ISDA Feasibility Study: Extending Collateralized Portfolio Reconciliations (Dec. 18, 2009) (*available at* http://www.isda.org/c_and_a/pdf/ISDA-Portfolio-Reconciliation-Feasibility-Study.pdf). The Commission is seeking comment about the overall size of the security-based swap market.

⁷⁴ This 80% figure is based on the quotient of dividing the 4,000 participants that could qualify for the end-user clearing exception by the estimated 5,000 participants in the security-based swaps marketplace.

⁷⁵ See *supra* note 73. An estimate that non-financial entities account for 1% of security-based swap transactions will be used for purposes of the calculations that follow below.

⁷⁶ See Definitions Proposing Release, *supra* note 3.

⁷⁷ The Commission preliminarily believes some entities establish and follow these types of procedures so that their hedging transactions will qualify for hedge accounting treatment under generally accepted accounting principles, which require procedures similar to those contained in this proposed rule, or to meet other statutory requirements. While hedging relationships involving security-based swaps that qualify for the hedging or mitigating commercial risk exception within the proposed rule are not limited to those recognized as hedges for accounting purposes, we believe that entities that are not seeking hedge accounting treatment for their hedging transactions commonly identify and document their risk management activities as well as assess the effectiveness of those activities as a matter of good business practice. See also Item 305 of Regulation S-K, 17 CFR 229.305 (requiring SEC Filers to provide identified risk based disclosures relating to their activities in financial derivatives); Internal revenue Code Section 1259 (26 U.S.C. 1259) (recognizing hedging transactions as "constructive sales" of certain appreciated financial positions in specified circumstances).

each reporting party, to adjust these established risk management or financial control systems to accommodate the requirements of proposed Rule 3a67–4.⁷⁸

The Commission preliminarily estimates that to gather the information required to notify the Commission that a security-based swap is being used to hedge or mitigate commercial risk purposes of proposed Rule 3Cg–1(a)(4) would impose an ongoing aggregate annual burden of approximately 62,000 burden hours for all respondents, which corresponds to an ongoing annual aggregate burden of approximately 16 burden hours for each respondent.⁷⁹ The Commission further preliminarily estimates that for a party to make an assessment required under proposed Rules 3Cg–1(b) and (c) of the proposed alternative rule text, if applicable, gather the remaining information required by proposed Rule 3Cg–1(a) and include the information in the security-based swap information delivered to an SDR as contemplated by proposed Regulation SBSR would impose an ongoing aggregate annual burden of approximately 31,000 burden hours for all respondents, which corresponds to an ongoing aggregate annual burden of approximately eight (8) burden hours for each respondent,⁸⁰ as each item of additional information is factual information known to the party invoking the end-user clearing exception and unlikely to vary from transaction to transaction.⁸¹

⁷⁸ This figure is based on the following: (Senior Business Analyst at 4 hours) + (Compliance Manager at 4 hours) + (Director of Compliance at 2 hours) + (Compliance Attorney at 1 hour) × (4,000 respondents) = 44,000 burden hours; (44,000 burden hours per year)/(4,000 respondents) = 11 burden hours per year per respondent.

⁷⁹ These figures are based on the following: ((Senior Business Analyst at 30 minutes) + (Compliance Manager at 30 minutes)) × (6,200,000 security-based swap transactions) × (1% transactions by parties eligible to invoke end-user clearing exception))/60 minutes = 62,000 burden hours per year; (62,000 burden hours per year)/4,000 respondents = 15.5 burden hours per year per respondent.

⁸⁰ These figures are based on the following: ((Compliance Manager at 30 minutes) × (6,200,000 security-based swap transactions) × (1% transactions by parties eligible to invoke end-user clearing exception))/60 minutes = 31,000 burden hours per year; (31,000 burden hours per year)/4,000 respondents = 7.75 burden hours per year per respondent.

⁸¹ For example, the Commission preliminarily expects that a counterparty's status as a non-financial entity, a finance affiliate or an SEC Filer would change infrequently. The Commission understands the time required to collect this information is likely to vary depending on whether the particular security-based swap is documented using electronic or manual processes. Electronic processes allow for fields of required information to be populated automatically, substantially reducing the time required for transaction processing and

The Commission preliminarily believes that proposed Rule 3Cg–1 would impose minimal additional burdens on either Reporting Parties not using the end-user clearing exception themselves or on SDRs. Reporting Parties would be required by proposed Regulation SBSR to report transaction information relating to security-based swaps in a specified manner, and the Commission therefore preliminarily believes reporting a limited number of additional data elements to the SDR in an equivalent manner will have a *de minimis* effect on the burdens they experience. Similarly, the Commission preliminarily believes that for an SDR to receive and retain these additional data fields would effectively impose minimal additional burdens, as the information would be transmitted and received electronically and would then be stored as part of the existing transaction data already required under proposed Regulation SBSR.

For the reasons described above, the Commission preliminarily estimates that the initial one-time aggregate burden associated with proposed Rule 3Cg–1 would be 44,000 hours, corresponding to 11 burden hours for each respondent,⁸² and the recurring aggregate annualized burden associated with proposed Rule 3Cg–1 would be 93,000 burden hours, which corresponds to 23 annual burden hours per respondent.⁸³

E. Collection of Information Is Mandatory

The collection of information under proposed Rule 3Cg–1 would be mandatory when a security-based swap counterparty chooses to invoke the end-user clearing exception.

compliance confirmation. A high percentage of electronically eligible security-based swaps are currently transacted using electronic processes. See ISDA, 2010 ISDA Operations Benchmarking Survey (available at http://www.isda.org/c_and_a/pdf/ISDA-Operations-Survey-2010.pdf) (showing that for credit derivatives 99% of transactions are eligible to be confirmed electronically and 98% of eligible transactions are confirmed electronically, while for equity derivatives 36% of transactions are eligible to be confirmed electronically and 81% of eligible transactions are confirmed electronically). The Commission preliminarily believes CDS transactions represent 85% of all security-based swap transactions. See *supra* note 69. The 30 minutes of time estimated to be required to produce the information to comply with proposed Rule 3Cg–1 (other than the hedging or mitigating commercial risk requirement) is intended to account for both manually and electronically processed transactions.

⁸² See *supra* note 78 and accompanying text.

⁸³ This figure is the sum of the calculations presented in notes 79 and 80 above. Summation differences between the final figures in the body of the text are due to the effects of rounding.

F. Record Retention Period

Information collected pursuant to proposed Rule 3Cg–1 would be required to be retained for not less than five years. The Commission recently proposed to adopt rules to regulate the operation of SDRs, which include recordkeeping requirements for security-based swap transaction data reported to a registered SDR pursuant to proposed Regulation SBSR. Specifically, proposed Rule 13n–5(b)(5) would require registered SDRs to maintain the transaction data for not less than five years after the applicable security-based swap expires and historical positions and historical market values for not less than five years.⁸⁴ Exchange Act Section 13A(c)⁸⁵ requires each party to a non-cleared security-based swap to maintain records of the security-based swaps held by such party in the form required by the Commission, and Exchange Act Section 13A(d)⁸⁶ mandates that these records must be in a form not less comprehensive than required to be collected by SDRs. These records are available for inspection by the Commission and other specified authorities pursuant to Exchange Act Section 13A(c)(2).⁸⁷ Accordingly, security-based swap transaction reports received by a registered SDR pursuant to proposed Rule 3Cg–1 and proposed Rule 901 of Regulation SBSR would be required to be retained for not less than five years.

G. Responses to Collection of Information Will Be Kept Confidential

A registered SDR would be under a general obligation to maintain the confidentiality of all information collected pursuant to proposed Rule 3Cg–1 and proposed Rule 901 of Regulation SBSR, subject to limited exceptions under proposed Regulation SDR.⁸⁸ The Commission also preliminarily believes that the additional information collected pursuant to proposed Rule 3Cg–1 would either fall under the exception to public dissemination contained in proposed Rule 902(c)(2), or otherwise should be excluded from the publicly-disseminated transaction report.⁸⁹ Accordingly, the Commission preliminarily believes the collection of

⁸⁴ See Regulation SDR Release, *supra* note 42. See also Public Law 111–203, § 763(i) (adding Exchange Act Section 13(n)(5)).

⁸⁵ See Public Law 111–203, sec. 766(a) (adding Exchange Act Section 13A(c)).

⁸⁶ See Public Law 111–203, sec. 766(a) (adding Exchange Act Section 13A(d)).

⁸⁷ See Public Law 111–203, sec. 766(a) (adding Exchange Act Section 13A(c)(2)).

⁸⁸ See Regulation SDR Release, *supra* note 42.

⁸⁹ See *supra* note 47 and accompanying text.

information pursuant to proposed Rule 3Cg-1 would be confidential and would not be publicly available.

To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential, subject to the provisions of the Freedom of Information Act ("FOIA"). Exemption 4 of FOIA provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."⁹⁰ The information required to be submitted to the Commission under proposed Rule 3Cg-1 may contain proprietary financial information regarding security-based swap transactions and therefore be subject to protection from disclosure under Exemption 4 of the FOIA.

H. Request for Comment

Pursuant to 44 U.S.C. 3505(c)(2)(B), the Commission solicits comment to:

1. Evaluate whether the proposed collection of information is necessary for the performance of the functions of the agency, including whether the information shall have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
3. Enhance the quality, utility and clarity of the information to be collected; and
4. Minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons wishing to submit comments on the collection of information requirements should direct them to the following persons: (1) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, OMB, Room 3208, New Executive Office Building, Washington, DC 20503; and (2) Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090 with reference to File No. S7-43-10. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The Commission has submitted the proposed collection of information to OMB for approval. Requests for the materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-43-10, and

be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street, NE., Washington, DC 20549-0213.

VI. Analysis of Costs and Benefits of the Proposed Rule

Proposed Rule 3Cg-1 implements the requirements of Exchange Act Section 3C(g) which provides an exception to the general requirement that a security-based swap must be cleared provided that one party to the security-based swap (1) Is not a financial entity, (2) is using security-based swaps to hedge or mitigate commercial risk, and (3) notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared security-based swaps. The application of the end-user clearing exception is solely at the discretion of the counterparty to the security-based swap that meets the conditions of Exchange Act Section 3C(g)(1). Section 3C(g) specifically preserves the ability of counterparties qualifying for the end-user clearing exception to elect to clear a security-based swap when a clearing agency is available and to select the clearing agency at which the security-based swap will be cleared.

The purpose of mandatory clearing of security-based swap products is to centralize individual counterparty risks through a clearing agency acting as a central counterparty that distributes risk among the clearing agency's participants. When effective, centralization of counterparty risks through clearing reduces the likelihood that defaults propagate between counterparties by establishing and enforcing margin requirements based on risk-based models and parameters designed to limit the possibility that participants will be exposed to losses they cannot anticipate or control. Effective central clearing can also lessen the risk of capital flight from a dealer that becomes economically distressed. In particular, without central clearing, a solvency concern at a major dealer could be made worse by its counterparties quickly moving to other dealers.⁹¹

However, mandatory clearing of security-based swap products may also alter the burdens on non-financial end-users of derivatives relative to bilateral transactions, including direct costs associated with clearing fees and

additional margin requirements and indirect costs associated with using derivatives less tailored to their individual business needs and thereby possibly affect their risk management practices.⁹² Exchange Act Section 3C(g) is designed to permit non-financial end-users that meet the specified conditions to elect not to centrally clear security-based swaps and retain flexibility to use both cleared and non-cleared security-based swaps in their risk management activities.

A. Notification to the Commission

Exchange Act Section 3C(g)(1)(C) requires a non-financial entity that uses security-based swaps to hedge or mitigate commercial risk to notify the Commission how it generally meets its financial obligations associated with non-cleared security-based swaps in order for the end-user clearing exception to be available.⁹³ Section 3C(g)(1)(C) contemplates that the Commission may establish the manner of notification and Exchange Act Section 3C(g)(6) provides that the Commission may prescribe such rules as may be necessary to prevent abuse of the end-user clearing exception. In accordance with Exchange Act Sections 3C(g)(1)(C) and 3C(g)(6), proposed Rule 3Cg-1(a) requires that notification be given to the Commission by delivering specified information to a registered SDR or the Commission with each security-based swap transaction that invokes the end-user clearing exception in the manner required by proposed new Regulation SBSR under the Exchange Act.⁹⁴

1. Meeting Financial Obligations

Proposed Rule 3Cg-1(a)(5) requires the reporting of five specified items of information to satisfy the requirement under the Exchange Act Section 3C(g)(1)(C) for a non-financial entity invoking the end-user clearing exception to notify the Commission of "how it generally meets its financial obligations associated with non-cleared security-based swaps." Because non-cleared security-based swaps are not subject to uniform margin and collateral requirements such as those established by clearing agencies, providing this information will be useful in monitoring the extent to which non-financial entities that invoke the end-user exception are taking steps to mitigate credit risks associated with security-based swaps.

⁹¹ Darrell Duffie and Haoxiang Zhu, "Does a Central Clearing Counterparty Reduce Counterparty Risk?" (Stanford University, Working Paper, 2010) (available at <http://www.stanford.edu/~duffie/DuffieZhu.pdf>).

⁹² See *supra* note 11 and accompanying text.

⁹³ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(1)(c)).

⁹⁴ See Regulation SBSR Proposing Release, *supra* note 16.

⁹⁰ 5 U.S.C. 552(b)(4).

In order to understand these potential risks, proposed Rule 3Cg-1(a)(5) requires a counterparty invoking the end-user clearing exception to provide notification regarding how they expect to meet their financial obligations associated with the security-based swap by reporting specified information to a registered security-based swap depository. In particular, an entity invoking the end-user clearing exception must indicate in the materials provided to the SDR whether it provides security for the performance of its financial obligations by (i) Transferring assets directly to the security-based swap counterparty pursuant to a written credit support agreement; (ii) pledging collateral pursuant to a security arrangement not requiring the transfer of collateral to the security-based swap counterparty; (iii) receiving credit support from a third-party pursuant to a written guarantee; (iv) solely relying on its available financial resources; or (v) using other means.

a. Benefits

Requiring end-users to provide the Commission with general information regarding their arrangements to meet financial obligations associated with non-cleared security-based swaps may confer benefits by reducing concerns about the potential risks that these market participants introduce into the financial markets in the absence of central clearing. The notification will also allow the Commission to understand how margining and other credit support practices may affect the prices and liquidity of security-based swaps, including by comparing and contrasting the trading costs of non-cleared security-based swaps with different credit support characteristics to each other and to security-based swaps that are cleared. Proposed Rule 3Cg-1(a)(5) also establishes a reporting option for "other means" that may be used to meet financial obligations associated with non-cleared security-based swaps providing the Commission with insight on the possible emergence of new and currently less common methods of mitigating financial risks associated with non-cleared security-based swaps that may arise as the market develops.

b. Costs

The Commission preliminarily estimates the costs associated with the notification required by Rule 3Cg-1(a)(5) will be limited, as the methods used to meet financial obligations associated with non-cleared security-based swaps are expected to be readily known to counterparties invoking the

end-user clearing exception and unlikely to vary from transaction to transaction. The Commission preliminarily estimates there are 6,200,000 transactions in security-based swaps annually,⁹⁵ and that parties eligible to invoke the end-user clearing exception are counterparties in approximately 1% of all security-based swap transactions.⁹⁶ The Commission preliminarily estimates that to gather the information required for purposes of complying with proposed Rule 3Cg-1(a)(5) would impose an ongoing aggregate annual burden of approximately 15,500 burden hours for all respondents, which corresponds to a burden of four (4) burden hours for each respondent.⁹⁷ Accordingly, applying an estimated hourly cost of \$316 for a compliance attorney to gather information about how the counterparty is meeting its Financial Notice Obligation,⁹⁸ the Commission preliminarily estimates proposed Rule 3Cg-1(a)(5) would result in an ongoing aggregate annual cost of \$4,900,000 to the entire end-user community, which corresponds to an average ongoing aggregate annual cost of \$1,225 per end-user.⁹⁹

2. Preventing Abuse of the End-User Clearing Exception

To aid the Commission's efforts to prevent abuse of the end-user clearing exception, proposed Rule 3Cg-1(a) requires notification of which of the counterparties to the security-based swap is invoking the end-user clearing exception, whether the counterparty invoking the exception is or is not a financial entity, whether the

counterparty invoking the exception is a finance affiliate meeting the requirements of Exchange Act 3C(g)(4), whether the counterparty invoking the exception uses the security-based swap to hedge or mitigate commercial risk, and whether the counterparty invoking the exception is an SEC Filer. SEC Filers invoking the end-user clearing exception must provide their SEC Central Index Key number and confirm that an appropriate committee of the SEC Filer's board of directors or equivalent body has reviewed and approved the decision to enter into the security-based swap that is subject to the end-user clearing exception.

a. Benefits

Requiring notification of the above-listed information would provide regulators with information about the end-user that could help verify that the end-user clearing exception is being invoked by market participants appropriately. The requirement to identify which counterparty is invoking the end-user clearing exception is critical in making this determination. Similarly, since Exchange Act Section 3C(g) limits the availability of the end-user clearing exception to non-financial entities and counterparties hedging or the mitigating commercial risk, an affirmative notification to the Commission that these two factors are satisfied will help verify eligibility of the counterparty to invoke the exception. Given the nature of the specific provisions in the Exchange Act governing use of the end-user clearing exception by finance affiliates,¹⁰⁰ separately identifying transactions involving finance affiliates will also help to ensure these requirements are complied with over time.

The Commission preliminarily expects counterparties to security-based swaps invoking the end-user clearing exception would frequently be entities that have raised capital in public financial markets and are therefore regulated by the Commission.¹⁰¹ Entities registered under the Exchange Act Section 12 or required to file reports pursuant to the Exchange Act Section 15(d) are generally required to include a discussion of qualitative and quantitative elements of market risk in annual reports filed with the Commission, including a discussion of

⁹⁵ See *supra* note 72 and accompanying text.

⁹⁶ Based on the information presented in note 73 above and the accompanying text, the Commission preliminarily estimates entities qualifying for the end-user exception are involved in roughly 1% of the estimated 6,200,000 annual security-based swap transactions, or 62,000 such transactions ((6,200,000 × 1%) = 62,000).

⁹⁷ See *supra* note 80 and accompanying text. The estimates that follow are based on an assumption that the burden of complying with proposed Rule 3Cg-1(a)(5) is equivalent to the burden of complying with the other requirements of proposed Rule 3Cg-1, not including proposed Rule 3Cg-1(a)(4).

⁹⁸ The hourly rate for the compliance attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2009*, modified by the Commission's staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. The remaining hourly rates for professionals used in this cost benefit analysis section are also derived from this source and modified in the same manner.

⁹⁹ These monetized costs are calculated as follows: (15 minutes/60 minutes per hour) × (\$316 dollars per hour) × (62,000 security-based swap transactions annually) = \$4,898,000 annually; (\$4,898,000 annually)/4,000 respondents = \$1,225 average annually per respondent.

¹⁰⁰ See Public Law 111-203, sec. 763(a) (adding Exchange Act Section 3C(g)(4)).

¹⁰¹ See Coalition for Derivatives End-Users comment (September 20, 2010), pursuant to Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Rel. No. 34-62,717, 75 FR 51,429 (Aug. 20, 2010).

how derivatives are used to manage risk.¹⁰² Notification by an end-user that it is subject to this requirement would allow regulators to review how frequently SEC Filers use the end-user clearing exception and better understand how security-based swaps are used by SEC Filers to hedge or mitigate commercial risk. The proposed requirement that SEC Filers invoking the end-user clearing exception provide the relevant Commission file number will allow the Commission to cross reference information received in connection with the end-user clearing exception with other Commission documents more easily. The additional proposed requirement that SEC Filers indicate whether a committee of the board of directors (or equivalent body) reviewed and approved the decision to enter into the security-based swap that is the subject of the end-user clearing exception would serve as confirmation that the requirements of Exchange Act Section 3C(i) applicable to SEC Filers were completed.

b. Costs

To qualify for the end-user clearing exception a non-financial entity would be required to determine whether the terms of the proposed security-based swap and the manner in which it will be used satisfy the definition of hedging or mitigating commercial risk established by proposed Exchange Act Rule 3a67-4. To meet the requirements of the definition, subsection 3a67-4(a)(3) of proposed Rule 3a67-4 specifies that the counterparty to the security-based swap must identify and document one or more risks associated with the present or future conduct and management of the enterprise and establish and document a method of assessing the effectiveness of the security-based swap as a hedge for such identified risks.

The Commission preliminarily believes that non-financial entities seeking to invoke the end-user clearing exception would need to establish and maintain an appropriate compliance mechanism to meet the hedge or mitigate standard in proposed Rule 3a67-4 including the necessary

professional, legal, technical and administrative support to make and document the required assessment of hedging effectiveness.¹⁰³ The Commission also preliminarily believes that counterparties transacting in security-based swaps to hedge commercial risks ordinarily will have established risk management systems in place for other reasons that can be adjusted to accommodate the requirements of proposed Rule 3Cg-1(a)(4) and proposed Rule 3a67-4.¹⁰⁴ Accordingly, the Commission preliminarily estimates that designing and implementing an appropriate compliance and support program to identify the risks being reduced and document the hedging effectiveness of security-based swaps would impose an initial one time initial aggregate cost of \$13,200,000 to all end-users, which corresponds to an average initial cost of \$3300 per end-user.¹⁰⁵

The Commission expects there would also be ongoing costs associated with determining whether the hedging or mitigating commercial risk standard is met for each security-based swap transaction for which the end-user clearing exception is invoked. The Commission preliminarily estimates that to gather the information required for purposes of complying with proposed Rule 3a67-4 and proposed Rule 3Cg-1(a)(4) would impose an ongoing aggregate annual burden of approximately 62,000 burden hours for all respondents, which corresponds to a burden of 16 burden hours for each respondent.¹⁰⁶ Assuming an hourly cost of \$234 per hour for a senior business analyst and \$294 per hour for a compliance manager to meet this requirement, proposed Rule 3Cg-1 would impose an annual cost of \$16,400,000 to all end-users and an average annual cost of \$4,100 dollars per end-user.¹⁰⁷

¹⁰³ See *supra* note 76 and accompanying text.

¹⁰⁴ See *supra* note 77 and accompanying text.

¹⁰⁵ This figure is based on the following: (Senior Business Analyst at 4 hours × \$234 per hour) + (Compliance Manager at 4 hours × \$294 per hour) + (Director of Compliance at 2 hours × \$426 per hour) + (Compliance Attorney at 1 hour × \$316 per hour) × (4,000 respondents) = \$13,120,000; (\$13,120,000 initial aggregate cost)/(4,000 respondents) = \$3,280 initial aggregate cost per respondent. See also *supra* note 78.

¹⁰⁶ See *supra* note 79 and accompanying text. The estimates that follow are based on an assumption that the burden of complying with proposed Rule 3Cg-1(a)(5) is equivalent to the burden of complying with the requirements of proposed Rule 3Cg-1, not including proposed Rules 3Cg-1(a)(4), given the comparable nature of the information required.

¹⁰⁷ This figure is based on the following: ((Senior Business Analyst at 30 minutes × \$234 per hour) + (Compliance Manager at 30 minutes × \$294 per hour)) × ((6,200,000 security-based swap

It was estimated that to make an assessment required under proposed Rules 3Cg-1(b) and (c) of the alternative proposed rule text, if applicable, gather the information required by Rule 3Cg-1(a) besides the information with respect to hedging or mitigating commercial risk, would require the additional work of a compliance manager.¹⁰⁸ That information is factual information a party is likely to have as a result of its existing compliance process and the information is unlikely to vary between transactions.¹⁰⁹ Costs associated with collecting requisite Financial Obligation Notice information required by proposed Rule 3Cg-1(a)(5) have already been discussed.¹¹⁰ Therefore, the information collection and reporting costs that remain to be accounted for are those not associated with either proposed Rules 3Cg-1(a)(4) or (5). The Commission preliminarily estimates that to gather the information required for purposes of complying with proposed Rule 3Cg-1 other than proposed Rules 3Cg-1(a)(4) and (5) would impose an ongoing aggregate annual burden of approximately 15,500 burden hours for all respondents, which corresponds to a burden of four (4) burden hours for each respondent.¹¹¹ These remaining costs are estimated to impose an annual cost of approximately \$4,600,000 on all respondents and an average annual cost of approximately \$1,200 per respondent.¹¹²

transactions) × (1% transactions by parties eligible to invoke end-user clearing exception)) = \$16,368,000 aggregate ongoing costs per year; (\$16,368,000 aggregate ongoing costs per year)/(4,000 respondents) = \$4,092 in aggregate ongoing costs per year per respondent. These figures do not include the costs associated with complying with proposed Rule 3Cg-1(a)(5), which are separately accounted for in note 99 above and the accompanying text, or costs associated with proposed Rule 3Cg-1 other than proposed Rules 3Cg-1(a)(4) and (5), which are separately accounted for in note 112 below and the accompanying text. See also *supra* note 79.

¹⁰⁸ See *supra* note 80 and accompanying text.

¹⁰⁹ See *supra* note 81.

¹¹⁰ See *supra* note 99 and accompanying text.

¹¹¹ See *supra* note 80 and accompanying text. The estimates that follow are based on an assumption that the burden of complying with proposed Rule 3Cg-1(a)(5) is equivalent to the burden of complying with the requirements of proposed Rule 3Cg-1, not including proposed Rule 3Cg-1(a)(4), given the comparable nature of the information required.

¹¹² These monetized costs are calculated as follows: (15 minutes/60 minutes per hour) × (Compliance Manager at \$294 dollars per hour) × (62,000 security-based swap transactions annually) = \$4,557,000 annually; (\$4,557,000 dollars annually)/(4,000 respondents) = \$1,139 average annually per respondent. These figures do not include the costs associated with complying with proposed Rule 3Cg-1(a)(5), which are separately accounted for in note 99 above and the accompanying text, and the costs associated with complying with proposed Rule 3Cg-1(a)(4), which

¹⁰² See Item 305 of Regulation S-K, 17 CFR 229.305. The Commission does not require companies with a public common equity float of less than \$75 million, or, if a company is unable to calculate public equity float, less than \$50 million in revenue in the last fiscal year to provide quantitative and qualitative disclosure about market risk as required of larger companies under Regulation S-K. See Smaller Reporting Company Regulatory Relief and Simplification, Securities Act Release No. 8876, Exchange Act Release No. 56994, Trust Indenture Act No. 2451 (Dec. 19, 2007), 73 FR 934 (Jan. 4, 2008).

3. Form of Notice to the Commission

Exchange Act Section 3C(g)(1)(C) requires that a non-financial entity invoking the end-user clearing exception notify the Commission how it generally meets its financial obligations and gives the Commission discretion to establish how to collect this information. To satisfy this requirement, proposed Rule 3Cg-1(a) requires entities invoking the end-user clearing exception to deliver specified information to a registered SDR in the form and manner required for delivery of information specified under proposed Rule 901(d) of Regulation SBSR.¹¹³ Under this approach, rather than collecting information through a separate process established by the Commission for these purposes, the information delivered in compliance with the requirements of proposed Rule 3Cg-1(a) and proposed Regulation SBSR would serve as the notice to the Commission necessary to invoke the end-user clearing exception.

a. Benefits

Since all market participants must already report security-based swap transactions to a registered SDR, the Commission preliminarily believes that requiring participants invoking the end-user clearing exception to report the information required by proposed Rule 3Cg-1(a) as part of the transaction record should be a reliable and cost-effective method of collecting the information. Standardized reporting through a registered SDR also should increase transparency of the market to regulators by providing a full account of all transactions, which benefits market participants through increased confidence in the reliability and integrity of market transactions and activity. Furthermore, standardized reports should allow periodic auditing, which should be less costly to regulators than examining on a case-by-case basis possibly unstructured financial data submitted by entities invoking the exception to perform their regulatory duties.

b. Costs

Because the form of notice required by proposed Rule 3Cg-1(a) would use the existing reporting and recordkeeping mechanism for security-based swap transactions that is required by proposed Rule 901 of Regulation SBSR, the Commission preliminarily believes the form of notice required by proposed Rule 3Cg-1(a) would impose no

additional burden on persons invoking the end-user clearing exception or SDRs other than those described above. The information required to be provided to the Commission pursuant to proposed Rule 3Cg-1(a) would be transmitted and received electronically and would be stored as part of the existing transaction materials that would be required to be prepared by proposed Regulation SBSR. The Commission preliminarily believes that information collected under proposed Rule 3Cg-1 will not be required to be publicly disseminated by the SDR, therefore the Commission preliminarily believes there will be no costs associated with organizing and posting such information under the requirements for public dissemination of information proposed to be met by SDRs.¹¹⁴

4. Total Costs

In total, the Commission preliminarily estimates that proposed Rule 3Cg-1 would result in a one-time initial aggregate annualized cost of \$13,200,000, or \$3400 per covered entity¹¹⁵ and an ongoing aggregate annualized cost of \$25,900,000 for all covered entities, or approximately \$6,500 per covered entity.¹¹⁶

B. Request for Comments

The Commission requests comment on the costs and benefits of proposed Rule 3Cg-1 discussed above, as well as any costs and benefits not already described that could result. The Commission also requests data to quantify any potential costs and benefits. In addition, the Commission requests comment on the following:

- What other factors, if any, should the Commission consider to estimate the costs and benefits of proposed Rule 3Cg-1?
- Is there additional data the Commission should use to estimate the costs and benefits of proposed Rule 3Cg-1?
- Would proposed Rule 3Cg-1 create additional costs and benefits not discussed here?

¹¹⁴ See Regulation SBSR Proposing Release, *supra* note 16, proposed Rule 902; Regulation SDR Release, *supra* note 42, proposed Rule 13n-4(b)(6).

¹¹⁵ See *supra* note 105 and accompanying text.

¹¹⁶ These figures are based on the following: (\$4,900,000 associated with proposed Rule 3Cg-1(a)(5)) + (\$16,400,000 to comply with proposed Rule 3Cg-1(a)(4)) + (\$4,600,000 to comply with other notification requirements established by Rule 3Cg-1) = \$25,900,000; (\$25,900,000 aggregate annual ongoing costs)/(4000 covered entities) = \$6,475 per covered entity.

VII. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation. In addition to the protection of investors, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact of such rules on competition.¹¹⁷ Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission preliminarily believes that the Rule 3Cg-1 would impose limited competitive burdens on counterparties to security-based swaps qualifying for the end-user clearing exception and the financial markets generally because the overall costs associated with invoking the end-user clearing exception are limited. Using the proposed reporting structure of Regulation SBSR to satisfy the notice requirement necessary to invoke the end-user clearing exception would promote efficiency by allowing participants in the security-based swap market to use an existing process to accomplish an additional legislative requirement. Satisfaction of the notice requirement in this way is preliminarily believed by the Commission to promote efficiency by allowing participants to fully utilize the capabilities of SDRs being established to serve the security-based swaps market specifically rather than requiring them to use a separate filing process and data repository created for other purposes, such as the Commission's EDGAR system, or to establish new infrastructure or business processes to meet the statutory notice obligation.

The end-user clearing exception would be available to non-financial entities¹¹⁸ that use security-based swaps to hedge or mitigate commercial risk, but do not necessarily compete with each other. Such counterparties by definition would not transact in

¹¹⁷ See 15 U.S.C. 78w(a)(2).

¹¹⁸ For purposes of the discussion that follows, the term "non-financial entities" includes Identified Financial Institutions that would be excluded from the definition of "financial entity" in Exchange Act Section 3C(g)(3) in the event the proposed alternative language in Rules 3Cg-1(b) and (c) is adopted by the Commission.

are separately accounted for in note 107 above and the accompanying text.

¹¹³ See *supra* notes 16–20 and accompanying text.

security-based swaps as their primary business, but rather as part of a risk management program related to their other commercial operations. Therefore, the Commission preliminarily expects the end-user clearing exception to have a neutral effect on competition. In addition, proposed Rule 3Cg-1 contains elements noted above intended to limit the potential for the end-user clearing exception to be abused, as contemplated by Exchange Act Section 3C(g)(6). Features of this kind are preliminarily expected by the Commission to limit the potential for counterparties that make use of the exception to avoid the mandatory clearing requirements to gain an unfair competitive advantage over their competitors.

Proposed Rule 3Cg-1 allows certain non-financial entities who use security-based swaps to hedge or mitigate commercial risk to bypass mandatory clearing, and instead engage in non-cleared security-based swap transactions even when equivalent products are available for clearing by a central counterparty. To the extent that proposed Rule 3Cg-1 is successful in separating appropriate uses of the end-user clearing exception from abusive ones, the proposed rule should help economic efficiency and capital formation by not imposing additional costs on end-users using security-based swaps to hedge or mitigate commercial risk and therefore not contributing to systemic risk in the financial system.

The Commission requests comment on the possible effects of proposed Rule 3Cg-1 on efficiency, competition, and capital formation. The Commission requests that commenters provide views and supporting information regarding any such effects. The Commission notes that such effects are difficult to quantify. The Commission seeks comment on possible anti-competitive effects of the proposed Rule not already identified. The Commission also requests comment regarding the competitive effects of pursuing alternative regulatory approaches such as requiring notice to be provided through the Commission's EDGAR system. In addition, the Commission requests comment on how the other provisions of the Dodd-Frank Act, for which Commission rulemaking is required, will interact with and influence the competitive effects of the proposed Rule.

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") the Commission must advise the OMB whether the proposed

regulation constitutes a "major" rule.¹¹⁹ Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is "major," its effectiveness will generally be delayed for 60 days pending Congressional review.

The Commission requests comment on the potential impact of proposed Rule 3Cg-1, on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their view to the extent possible.

IX. Initial Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act¹²⁰ ("RFA") requires federal agencies, in promulgating rules, to make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. Alternatively, section 605(b) of the RFA provides that this analysis shall not apply to any proposed rule or proposed rule amendment, if the head of the agency certifies that the rule if promulgated will not have a significant economic impact on a substantial number of small entities.

For purposes of Commission rulemaking in connection with the RFA, a small business includes an issuer or person, other than an investment company, that on the last day of its most recent fiscal year had total assets of \$5 million or less.¹²¹ Based on input from security-based swap market participants and its own information, the Commission preliminarily believes that currently there is very little use of security-based swaps by non-financial entities that would be eligible to use the end-user clearing exception,¹²² and that the non-financial entities eligible to invoke the end-user clearing exception and transacting in security-based swaps would be corporations, partnerships and trusts with assets in excess of \$10

million.¹²³ On this basis, the Commission preliminarily believes that the number of security-based swap transactions involving a small entity as that term is defined for purposes of the RFA would be *de minimis*. Moreover, the Commission does not believe that any aspect of proposed Rule 3Cg-1 would be likely to alter the type of counterparties presently engaging in security-based transactions. Therefore, the Commission preliminarily believes that proposed Rule 3Cg-1 would have a *de minimis* impact on small entities.

For the foregoing reasons, the Commission certifies that Rule 3Cg-1 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission encourages written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

X. Statutory Basis and Text of Proposed Rule

Pursuant to the Exchange Act and particularly Section 3C thereof, the Commission proposes new Rule 3Cg-1, as set forth below, governing the exception to mandatory clearing of security-based swaps established by Exchange Act Section 3C(g).

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of the Proposed Rule

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations, is proposed to be amended as follows.

¹²³ The Commodity Futures Modernization Act of 2000 introduced the concept of "eligible contract participant" that the Commission preliminarily believes is a standard frequently referenced by market participants and which may act to limit the ability of non-financial entities with assets less than \$10 million to transact in security-based swaps. See Public Law 106-554, 114 Stat. 2763 (Dec. 21, 2000). See also Section 1(a)(18) of the Commodity Exchange Act ("CEA"), 7 U.S.C. 1a(18) as redesignated and amended by Section 721 of the Dodd-Frank Act (defining "eligible contract participant"). The Dodd-Frank Act added a definition of eligible contract participant to the Exchange Act which references the equivalent definition in the CEA, and created new standards to limit the ability of persons who are not eligible contract participants to transact in security-based swaps. See Public Law 111-203, § 761(a) (adding Exchange Act Section 3(a)(65)). See also Public Law 111-203, § 761(e) (adding Exchange Act Section 6(l)) (making it unlawful for any person to effect a transaction in a security-based swap for a person that is not an eligible contract participant, unless such transaction is conducted on a registered national securities exchange).

¹¹⁹ See Public Law 104-121 (March 29, 1996), as amended by Public Law 110-28 (May 25, 2007).

¹²⁰ See Public Law 96-354, 94 Stat. 1164 (1980), as amended by SBREFA.

¹²¹ 17 CFR 230.157. See also 17 CFR 240.0-10(a).

¹²² See *supra* note 73 and accompanying text.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation in numerical order to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Section 240.3Cg-1 is also issued under Public Law 111-203, § 763, 124 Stat. 1841 (2010).

* * * * *

2. Add § 240.3Cg-1 to read as follows:

§ 240.3Cg-1 Notice to the Commission [and Financial Entity Exemption].

(a) A counterparty to a security-based swap that invokes the clearing exception under Section 3C(g)(1) of the Act (15 U.S.C. 78c-3(g)(1)) shall satisfy the requirements of Section 3C(g)(1)(C) of the Act (15 U.S.C. 78c-3(g)(1)(C)) by delivering or causing to be delivered the following additional information to a registered security-based swap data repository (or, if none is available, to the Commission) in the form and manner required for delivery of the information separately specified under § 242.901(d) of Regulation SBSR of this chapter:

(1) The identity of the counterparty relying on the clearing exception;

(2) Whether the counterparty invoking the clearing exception is a “financial entity” as defined in Section 3C(g)(3) of the Act (15 U.S.C. 78c-3(g)(3));

(3) Whether the counterparty invoking the clearing exception is a finance affiliate meeting the requirements described in Section 3C(g)(4) of the Act (15 U.S.C. 78c-3(g)(4));

(4) Whether the security-based swap is used by the counterparty invoking the clearing exception to hedge or mitigate commercial risk as defined in § 240.3a67-4 of this chapter;

(5) Whether the counterparty invoking the clearing exception generally expects to meet its financial obligations associated with the security-based swap by using any of the following:

(i) A written credit support agreement;

(ii) A written agreement to pledge or segregate assets;

(iii) A written third-party guarantee;

(iv) Solely the counterparty’s available financial resources; or

(v) Means other than those described in paragraphs (a)(5)(i), (ii), (iii), and (iv) of this section;

(6) Whether the counterparty invoking the clearing exception is an issuer of securities registered under Section 12 (15 U.S.C. 78l) or subject to reporting requirements pursuant to Section 15(d) (15 U.S.C. 78o(d)) of the Act, and if so:

(i) The relevant Commission Central Index Key number for the counterparty invoking the clearing exception; and

(ii) Whether an appropriate committee of the board of directors (or equivalent body) of the counterparty invoking the clearing exception has reviewed and approved the decision to enter into a security-based swap subject to the clearing exception.

Additional Rule Text Under Consideration by the Commission

(b) For purposes of Section 3C(g)(1)(A) of the Act (15 U.S.C. 78c-3(g)(1)(A)), any person specified in paragraph (c) of this section that would be a financial entity within the meaning of the term in Section 3C(g)(3)(A) of the Act (15 U.S.C. 78c-3(g)(3)(A)) solely because of Section 3C(g)(3)(A)(viii) of the Act (15 U.S.C. 78c-3(g)(3)(A)(viii)) shall be exempt from the definition of financial entity.

(c) A person shall be eligible for the exemption in paragraph (b) of this section if such person:

(1) Is organized as a bank, as defined in Section 3(a)(6) of the Act (15 U.S.C. 78c), the deposits of which are insured by the Federal Deposit Insurance Corporation, a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1831), the deposits of which are insured by the Federal Deposit Insurance Corporation, a farm credit system institution chartered under the Farm Credit Act of 1971 (12 U.S.C. 2001), or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act (12 U.S.C. 1752); and

(2) Has total assets of \$10,000,000,000 or less on the last day of the most recent fiscal year.

By the Commission.

Dated: December 15, 2010.

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2010-31973 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 58

[Docket No. FDA-2010-N-0548]

Good Laboratory Practice for Nonclinical Laboratory Studies

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is seeking comment on whether to amend the regulations governing good laboratory practices (GLPs). The Agency decided that to require a GLP quality system for all facilities/laboratories, as well as to more completely address nonclinical studies as they are presently conducted, the Agency would need to modify the existing regulations.

DATES: Submit either electronic or written comments by February 22, 2011.

ADDRESSES: You may submit comments, identified by the Docket No. FDA-2010-N-0548, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- *Fax:* 301-827-6870.
- *Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions):* Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and docket number for this rulemaking. All comments received may be posted without change to <http://www.regulations.gov>, including any personal information provided. For additional information on submitting comments, see the “Comments” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and insert the docket number, found in the brackets in the heading of this document, into the “Search” box and follow the prompts

and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: C. T. Viswanathan, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5346, Silver Spring, MD 20993-0002, 301-796-3394.

SUPPLEMENTARY INFORMATION:

I. Background

FDA's GLP regulations, part 58 (21 CFR part 58), were finalized on December 22, 1978 (43 FR 60013). As stated in its scope (§ 58.1), this regulation prescribes good laboratory practices for conducting nonclinical laboratory studies that support or are intended to support applications for research or marketing permits for products regulated by FDA, including food and color additives, animal food additives, human and animal drugs, medical devices for human use, biological products, and electronic products. A nonclinical laboratory study, as defined in § 58.3(d), is an * * * in vivo or in vitro experiment in which test articles are studied prospectively in test systems under laboratory conditions to determine their safety. The term does not include studies utilizing human subjects or clinical studies or field trials in animals. [It also] does not include basic exploratory studies carried out to determine whether a test article has any potential utility or to determine physical or chemical characteristics of a test article.

The conduct of nonclinical laboratory studies has changed markedly since issuance of this regulation in 1978. For example, it is presently common for nonclinical laboratory studies to be conducted across multiple testing facilities, or sites (multisite studies). When the regulation was originally finalized, however, most studies were conducted within a single facility. In addition, laboratories have expanded the use of electronic technology, both for laboratory instrumentation and as a means for collecting, storing, and reporting study data. Current part 58 does not specifically describe these modern arrangements and advances.

In 2006, FDA announced its Human Subject Protection/Bioresearch Monitoring (HSP/BIMO) initiative aimed at modernizing the Agency's regulations and policies governing the conduct of studies used to support submissions to FDA. In response to the announcement of the HSP/BIMO initiative, FDA received stakeholder

recommendations that included suggestions for the revision of part 58. In 2007, FDA established an Agency-wide GLP working group (WG) to evaluate the existing regulation and determine if regulatory revision and/or guidance should be pursued. The WG gathered information as to the needs of each FDA center with regard to nonclinical laboratory studies, reviewed suggestions from external sources, conferred with the Environmental Protection Agency (EPA) which has a similar regulation, and performed a thorough evaluation of the existing regulations. The WG concluded that to ensure the integrity of the data in all nonclinical laboratory studies submitted to FDA, nonclinical laboratory facilities that conduct these studies need to follow a GLP quality system approach. Currently, the regulations governing nonclinical laboratory studies do not use such an approach consistently throughout part 58. A GLP quality system would allow nonclinical laboratories to develop standard operating procedures consistent with their specific operational needs as long as they satisfy regulatory requirements aimed at ensuring data integrity. The WG decided that to require a GLP quality system for all facilities/laboratories, as well as to more completely address nonclinical studies as they are presently conducted, the Agency would need to modify the existing regulations.

II. Agency Request for Information

FDA is soliciting public comments about whether to modify the existing regulations, and in particular about the areas FDA has identified as potentially appropriate for revision, as follows:

1. GLP Quality System

While many of the requirements of the existing regulation are consistent with a GLP quality system, FDA believes that modifications may be necessary to incorporate all basic elements needed for a comprehensive GLP quality system, such as that set forth in the internationally recognized standard, Quality management systems—Requirements ISO 9001, available from the International Organization for Standardization (ISO) at: <http://www.iso.org/iso/home.html>. Ultimately, any GLP quality system proposed for a facility must be capable of ensuring the integrity of resulting data. FDA is considering whether to include in the regulations a core set of essential elements for such a GLP quality system, including specifically mentioning management responsibility for all activities at the facility and

specifying a requirement for standard operating procedures for all essential functions.

2. Multisite Studies

It is currently common practice for nonclinical laboratory studies to be performed across multiple sites (multisite studies), rather than for a single facility to conduct all aspects/phases of a study. FDA is considering revising the GLP regulations to specifically address the use of multisite studies through the addition of specific definitions to describe personnel and study aspects specific to multisite studies, *e.g.*, by requiring that an individual be designated as the responsible person for each site of a multisite study. Such an individual would be responsible for any phase(s) of the study conducted at the site and would report to the study director.

3. Electronic/Computerized Systems

Since the regulation was finalized, many laboratory systems have become fully automated. In addition, many facilities now employ computerized systems for managing general laboratory functions as well as for instrumentation in which such systems are integral components. While the present regulation does not preclude such electronic systems, several of the current regulatory requirements are more consistent with paper-based systems (*e.g.*, an individual as archivist § 58.190(c); maintenance of copies of study protocols and the Master Schedule by the quality assurance unit (§ 58.35(b)(1) and (b)(2))). FDA is considering updating the regulation to reflect the use of electronic and computerized systems. FDA believes that any modifications to the regulation to reference electronic/computerized systems should be general, to accommodate changes and advances in technology.

4. Sponsor Responsibilities

Whether nonclinical laboratory studies are conducted by a sponsor or at a contracted facility, FDA believes that the study sponsor should clearly have responsibilities that the present regulation does not specifically mention, such as development and/or approval of study protocols. FDA is therefore considering amending the regulations to include additional specific responsibilities of sponsors of nonclinical laboratory studies.

5. Animal Welfare

In the United States, the Animal Welfare Act (7 U.S.C 2131–2159) governs the treatment and use of

animals, including their use for research purposes. FDA is soliciting comments regarding whether and how to receive documentation of compliance with these existing statutory provisions or comparable international standards governing the ethical and humane use of laboratory animals in nonclinical laboratory studies. This issue is not specifically addressed in the present regulation.

6. Information on Quality Assurance Inspectional Findings

When an FDA bioresearch monitoring (BIMO) inspection of a nonclinical study identifies problems, FDA often finds it difficult to determine whether the quality assurance unit (QAU) failed to adequately inspect the study, or whether the QAU made recommendations for corrective actions and management did not adequately respond. FDA is considering the addition of a requirement that the QAU prepare a yearly summary of general inspectional findings that would reveal problems that are not necessarily study-specific and that includes the recommendations made to management to resolve those problems. Such a report would be maintained at the facility and be made available to FDA upon request, usually during the course of a BIMO inspection.

7. Process-Based Systems Inspections

A number of procedures used in conducting a particular nonclinical laboratory study are common across many or even most studies conducted at the facility. Facilities often find it more resourceful to periodically inspect such procedures during systems inspections rather than repetitively as part of each study-specific inspection, as currently required in § 58.35(b). For example, it may be appropriate to periodically inspect procedures such as slide preparation for pathology studies as part of a facility's process-based systems inspections rather than for each study. FDA therefore is considering permitting a combination of systems inspections and study-specific inspections. The results of the appropriate systems inspection(s) would be referenced in the study-specific inspection reports relevant to those aspects of the procedures for the study under inspection.

8. Test and Control Article Information

When reviewing and inspecting nonclinical laboratory studies, particularly those submitted for new drugs (human and animal), basic information about the test article, such as strength, purity, stability, and for

mixtures thereof, concentration and uniformity, is often absent from the laboratory's records, therefore precluding appropriate interpretation of the study results. Although the current regulations require that these parameters be determined (§ 58.105(a) and (b) and § 58.113(a)), the regulations do not specify who is to receive this information or include a timeframe for delivery of the information to the facility performing the nonclinical testing. FDA is therefore considering additional requirements under the sections in the regulations discussing test and control characterization (§ 58.105) and mixtures of articles with carriers (§ 58.113), including timeframes for provision of this information to the study director.

In addition, sponsors have requested the ability to cite compliance with the applicable good manufacturing requirements (*i.e.*, parts 210 and 211, *etc.* as relevant) regarding the specifications, quality, and integrity of the test article. FDA is considering whether to accept compliance with either the specifics that would be required under a revised part 58, subpart F or the relevant good manufacturing requirements.

9. Sample Storage Container Retention

FDA's regulations currently require that facilities maintain test article storage containers for the duration of the study (21 CFR 58.105(c)). FDA believes that compliance with the regulatory requirements for the handling of test and control articles, which include documentation of receipt, distribution, and use of each batch (§ 58.107(d)) provides adequate information about the use and integrity of study samples. Therefore, FDA is considering eliminating the requirement at § 58.105(c).

FDA welcomes comments from all interested persons on these issues and any other concerns related to the current GLP regulations, including recommendations as to the best method(s) for addressing such concerns.

III. Comments

Interested persons may submit to the Division of Dockets Management (*see ADDRESSES*) either electronic or written comments regarding this document. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

This advance notice of proposed rulemaking is issued under section 201 *et al.* of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et al.*) and

under authority of the Commissioner of Food and Drugs.

Dated: December 15, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010-31888 Filed 12-20-10; 8:45 am]

BILLING CODE 4160-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 10-2279; MB Docket No. 10-65; RM-10595]

Radio Broadcasting Services; Jewett, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal.

SUMMARY: At the petitioner's request, the Audio Division has dismissed the proposal of Charles Crawford to allot Channel 232A at Jewett, Texas. Crawford had filed a petition for rule making proposing the allotment of Channel 232A at Jewett, Texas, as the community's first local FM transmission service.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 10-65, RM-10595, adopted December 1, 2010, and released December 3, 2010. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The complete text of this decision also may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (800) 378-3160, or via the company's Web site, <http://www.bcpweb.com>. This document is not subject to the Congressional Review Act. The Commission is, therefore, not required to send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* U.S.C. 801(a)(1)(A), because the proposed rule was dismissed.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 2010-31997 Filed 12-20-10; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION**Federal Motor Carrier Safety Administration****49 CFR Parts 383, 384, 390, 391, and 392**

[Docket No. FMCSA–2010–0096]

RIN 2126–AB29

Drivers of CMVs: Restricting the Use of Cellular Phones**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.**ACTION:** Notice of proposed rulemaking; request for comments.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) proposes to restrict the use of hand-held mobile telephones, including hand-held cell phones, by drivers of commercial motor vehicles (CMVs) while operating in interstate commerce. The Agency proposes new driver disqualification sanctions for interstate drivers of CMVs who fail to comply with this Federal restriction and new driver disqualification sanctions for commercial driver's license (CDL) holders who have multiple convictions for violating a State or local law or ordinance on motor vehicle traffic control that restricts the use of hand-held mobile telephones. Additionally, interstate motor carriers would be prohibited from requiring or allowing drivers of CMVs to engage in the use of a hand-held mobile telephone while operating in interstate commerce. This rulemaking would improve safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of CMVs.

DATES: FMCSA will be accepting both initial comments and reply comments in response to this Notice of Proposed Rulemaking (NPRM). Send your initial comments on or before February 22, 2011 and reply comments on or before March 21, 2011. Initial comments may address any issue raised in the NPRM and the background documents in the docket (*e.g.*, regulatory evaluation, studies, environmental assessment, etc.). Initial comments will be made available promptly electronically, online on <http://www.regulations.gov>, or for public inspection in room W12–140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. In order to allow sufficient opportunity for interested parties to prepare and submit any reply comments, late-filed initial

comments will not be considered. Reply comments must address only matters raised in initial comments and must not be used to present new arguments, contentions, or factual material that is not responsive to the initial comments.

ADDRESSES: You may submit comments and reply comments identified by docket number FMCSA–2010–0096 using any one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

- *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rule, contact Mr. Brian Routhier, Transportation Specialist, Federal Motor Carrier Safety Administration, Vehicle and Roadside Operation Division, at 202–366–4325 or FMCSA_MCPV@dot.gov.

SUPPLEMENTARY INFORMATION:**Table of Contents for Preamble**

- I. Public Participation and Request for Comments
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- IV. Discussion of Proposed Rule
- V. Regulatory Analyses

I. Public Participation and Request for Comments

FMCSA encourages you to participate in this rulemaking by submitting comments, reply comments, and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you provide.

A. Submitting Comments

If you submit a comment or a reply comment, please include the docket number for this rulemaking (FMCSA–2010–0096), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an e-mail address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment or reply comments online, go to <http://www.regulations.gov> and click on the “submit a comment” box, which will then become highlighted in blue. In the “Document Type” drop down menu, select “Proposed Rules,” insert “FMCSA–2010–0096” in the “Keyword” box, and click “Search.” When the new screen appears, click on “Submit a Comment” in the “Actions” column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½; by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents

To view comments or reply comments, as well as any documents mentioned in this preamble, go to <http://www.regulations.gov> and click on the “read comments” box in the upper right hand side of the screen. Then, in the “Keyword” box insert “FMCSA–2010–0096” and click “Search.” Next, click the “Open Docket Folder” in the “Actions” column. Finally, in the “Title” column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

C. Privacy Act

Anyone is able to search the electronic form of all comments

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316).

II. Abbreviations

AAMVA	American Association of Motor Vehicle Administrators
ABA	American Bus Association
Advocates	Advocates for Highway and Auto Safety
ATA	American Trucking Associations, Inc.
APTA	American Public Transportation Association
CDL	Commercial Driver's License
CMV	Commercial Motor Vehicle
CTA	Chicago Transit Authority
DOT	United States Department of Transportation
EA	Environmental Assessment
EIS	Environmental Impact Statement
FCC	Federal Communications Commission
FMCSA	Federal Motor Carrier Safety Administration
FMCSRs	Federal Motor Carrier Safety Regulations
FONSI	Finding of No Significant Impact
FR	Federal Register
FRA	Federal Railroad Administration
GCRTA	Greater Cleveland Regional Transit Authority
MBTA	Massachusetts Bay Transportation Authority
MCSAC	Motor Carrier Safety Advisory Committee
MCSAP	Motor Carrier Safety Assistance Program
NAICS	North American Industry Classification System
NCSL	National Conference of State Legislatures
NGA	National Governors Association
NPRM	Notice of Proposed Rulemaking
NSC	National Safety Council
NTSB	National Transportation Safety Board
OOIDA	Owner-Operator Independent Drivers Association
OMB	Office of Management and Budget
PAR	Population Attributable Risk
PDA	Personal Digital Assistant
TCA	Truckload Carriers Association
VTTI	Virginia Tech Transportation Institute

III. Background

A. Rationale for the Scope of the Proposed Rule

Driver distraction can be defined as the voluntary or involuntary diversion of attention from the primary driving tasks due to an object, event, or person. Researchers classify distraction into several categories: Visual (taking one's eyes off the road), manual (taking one's

hands off the wheel), cognitive (thinking about something other than the road/driving), and auditory (listening to someone talking). Research shows that using a hand-held mobile telephone while driving may pose a higher safety risk than other activities (e.g. eating and writing on a pad) because it involves all four types of driver distraction. For example, reaching for and dialing a mobile telephone are both visual and manual distractions. Using a hand-held mobile telephone may reduce a driver's situational awareness, decision making, or performance; and it may result in a crash, near-crash, unintended lane departure by the driver, or other unsafe driving action. This rulemaking proposes to restrict the use of hand-held mobile telephones because our research indicates that they are a source of driver distraction that could pose a safety risk. Specifically it would prohibit a CMV driver from reaching for, holding, or dialing a mobile telephone in order to conduct a voice communication while driving. Essentially, the CMV driver must be ready to conduct a voice communication in compliance with the proposed rule the moment he begins driving the vehicle.

In an effort to understand and mitigate crashes associated with driver distraction, the U.S. Department of Transportation (DOT) conducted research concerning behavioral and vehicle safety countermeasures to driver distraction. Data from studies¹ indicate that both reaching for and dialing a mobile telephone increase the odds of involvement in a safety-critical event such as a crash, near crash, or unintended lane departure.² Both reaching for and dialing a hand-held mobile telephone are manual distractions (i.e., hands-off wheel) and require substantial visual distraction

¹ Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA-RRR-09-042) Washington, DC: Federal Motor Carrier Safety Administration, July 2009. Retrieved October 20, 2009, from <http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx?> Hickman, J., Hanowski, R. & Bocanegra, J. (2010). Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes. Washington, DC: Federal Motor Carrier Safety Administration.

² In popular usage, mobile telephones are often referred to as "cell phones." As explained later in the NPRM, a variety of different technologies are licensed by the Federal Communications Commission (FCC) (47 CFR 20.3) to provide mobile telephone services; thus, the proposed rules here would apply to the range of technologies used to provide wireless telephone communications and the rule uses the broader term "mobile telephones." However, some of the materials discussed in this preamble use the popular term "cell phone," and the discussion continues that usage in such cases.

(i.e., eyes off forward roadway) to complete the task; therefore the driver may not be capable of safely operating the vehicle.

According to a VTTI study, the odds of being involved in a safety-critical event are three times greater when the driver is reaching for an object than when the driver is not reaching for an object. The odds of being involved in a safety-critical event are six times greater while the driver is dialing a cell phone than when the driver is not dialing a cell phone. These increases in risk are primarily attributable to the driver's eyes being off the forward roadway. Additionally, these activities have high population attributable risk (PAR) percentages (i.e., an activity, which if not undertaken, would increase safety most).³ The PAR percentage for reaching for an object was the highest in the study at 7.6 percent. Because of the physical, manual, and visual distractions and the data indicating a safety risk associated with the use of hand-held mobile telephones, FMCSA believes it is in the interest of public safety to propose, at a minimum, a restriction on hand-held mobile telephone use while driving a CMV.

Other governmental entities have made recommendations on mobile telephone use that go beyond our proposed rule. The National Transportation Safety Board (NTSB) determined that one probable cause of a November 2004 bus crash was the use of a hands-free cell phone. This crash was the impetus for an NTSB investigation (NTSB/HAR-06/04 PB2007-916201) and a subsequent recommendation to FMCSA that the Agency prohibit cell phone use by all passenger-carrying CMVs.⁴ FMCSA also received recommendations on cell phone use from its Motor Carrier Safety Advisory Committee (MCSAC). One of MCSAC's recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to ban the use of hand-held and hands-free mobile telephones while driving.

However, it is not clear if simply talking on a mobile telephone presents a significant risk. For example, the same VTTI study that detailed the risks of reaching and dialing found that "talking

³ See Section D. Studies of Mobile Telephone Use While Driving for a full discussion.

⁴ National Transportation Safety Board (2006) *Motorcoach Collision with the Alexandria Avenue Bridge Overpass, George Washington Memorial Parkway, Alexandria, Virginia, November 14, 2004* (Highway Accident Report NTSB/HAR-06/04; NTIS report number PB2007-916201). Retrieved July 22, 2010, from: <http://www.nts.gov/Publictn/2006/HAR0604.pdf>.

or listening to a hands-free phone” and “talking or listening to a hand-held phone” were relatively low risk activities and had only brief periods of eyes off forward roadway. It is the action of taking one’s eyes off the forward roadway to reach for and dial the mobile telephone that is highly risky. Therefore, our proposal does not go as far as the NTSB and MCSAC recommendations.

While some States have gone further than this proposed restriction on hand-held mobile telephones, no State has completely banned mobile telephone use. Nine States and the District of Columbia have traffic laws prohibiting all motor vehicle drivers from using a hand-held mobile telephone while driving. Some States have gone further for certain categories of drivers. Nineteen States and the District of Columbia prohibit the use of all mobile telephones while driving a school bus. Transit bus and motorcoach drivers are the focus of stricter mobile telephone rules in some States and local jurisdictions.⁵ This NPRM, which proposes to restrict hand-held mobile telephone use by all CMV drivers, is in line with existing regulations that hold CMV drivers to higher standards.

This rulemaking would improve safety on the Nation’s highways by reducing the prevalence of, or preventing, certain truck- and bus-related crashes, injuries, and fatalities associated with distracted driving. Our proposal would restrict hand-held mobile telephone use, but the Agency requests comment on whether we should implement in full the NTSB and MCSAC recommendations. The Agency requests public comment on the feasibility, operational impact, and safety benefits of prohibiting hands-free mobile telephone technology by drivers of CMVs as well. Because the Agency does not intend that this rulemaking preclude the use of innovative technologies that could be safely used by CMV drivers to facilitate mobile telephone use, the Agency will consider, through this rulemaking process, all information from interested parties, as it assesses the risks, feasibility, and safety of adopting an approach in the final rule. Public comment on these issues should also recognize our responsibility to ensure that CMV drivers are held to the highest degree of safety.

B. Legal Authority

The authority for this proposed rule derives from the Motor Carrier Safety

Act of 1984 (1984 Act), 49 U.S.C. chapter 311, and the Commercial Motor Vehicle Safety Act of 1986 (1986 Act), 49 U.S.C. chapter 313. The 1984 Act (Pub. L. 98–554, Title II, 98 Stat. 2832, Oct. 30, 1984) provides authority to regulate the safety of operations of CMV drivers and motor carriers and vehicle equipment. It requires the Secretary of Transportation (Secretary) to “prescribe regulations on commercial motor vehicle safety. The regulations shall prescribe minimum safety standards for commercial motor vehicles.” Although this authority is very broad, the 1984 Act also includes specific requirements in 49 U.S.C. 31136(a):

At a minimum, the regulations shall ensure that—(1) commercial motor vehicles are maintained, equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of commercial motor vehicles do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely; and (4) the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators.

This proposed rule is based primarily on 49 U.S.C. 31136(a)(1), which requires regulations that ensure that CMVs are operated safely, and secondarily on section 31136(a)(2), to the extent that drivers’ use of mobile telephones might impact their ability to operate CMVs safely. This NPRM does not address the physical condition of drivers (49 U.S.C. 31136(a)(3)), nor does it impact possible physical effects caused by driving CMVs (49 U.S.C. 31136(a)(4)).

The relevant provisions of the Federal Motor Carrier Safety Regulations (FMCSRs) (49 CFR subtitle B, chapter III, subchapter B) apply to CMV drivers and employers operating a CMV included in the statutory authority of the 1984 Act. The 1984 Act defines a CMV as a self-propelled or towed vehicle used on the highways to transport persons or property in interstate commerce; and that either: (1) Has a gross vehicle weight/gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers, not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle (49 U.S.C. 31132(1)). All drivers operating CMVs are subject to the FMCSRs, except those who are employed by Federal, State, or local governments (49 U.S.C. 31132(2)). The proposed rule would also require

employers to ensure their drivers comply with the restrictions on use of hand-held mobile telephones while driving CMVs.

In addition to the statutory exemption for government employees, there are several regulatory exemptions in the FMCSRs that are authorized under the 1984 Act, including, among others, one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver) not for direct compensation (49 CFR 390.3(f)(1) and (6)). The school bus operations exemption only applies to interstate transportation of school children and/or school personnel between home and school. This particular exemption is not based on any statutory provisions, but is instead a discretionary rule promulgated by the Agency. Therefore, FMCSA has authority to modify the exemption. Modification of the school bus operations exemption requires the Agency to find that such action “is necessary for public safety, considering all laws of the United States and States applicable to school buses” (former 49 U.S.C. 31136(e)(1)).⁶ Likewise, FMCSA has authority to modify the non-statutory exemption for small, passenger-carrying vehicles not for direct compensation, but is not required to comply with former 49 U.S.C. 31136(e).⁷ FMCSA is proposing to apply restrictions on hand-held mobile telephone use to both school bus operations by private operators in interstate commerce and small passenger-carrying vehicles not for direct compensation, although they would continue to be exempt from the rest of the FMCSRs. Other than transportation covered by statutory

⁶ Former section 31136(e)(1) was amended by section 4007(c) of the Transportation Equity Act for the 21st Century, Public Law 105–178, 112 Stat. 107, 403 (June 9, 1998) (TEA–21). However, TEA–21 also provides that the amendments made by section 4007(c) “shall not apply to or otherwise affect a waiver, exemption, or pilot program in effect on the day before the date of enactment of [TEA–21] under * * * section 31136(e) of title 49, United States Code.” (Section 4007(d), TEA–21, 112 Stat. 404 (set out as a note under 49 U.S.C. 31136).) The exemption for school bus operations in 49 CFR 390.3(f)(1) became effective on November 15, 1988, and was adopted pursuant to section 206(f) of the 1984 Act, later codified as section 31136(e) (*Federal Motor Carrier Safety Regulations; General*, 53 FR 18042–18043, 18053 (May 19, 1988) and section 1(e), Public Law 103–272, 108 Stat 1003 (July 5, 1994)). Therefore, any action by FMCSA affecting the school bus operations exemption would require the Agency to comply with former section 31136(e)(1).

⁷ The exemption in 49 CFR 390.3(f)(6) was not adopted until 2003, after the enactment of TEA–21, in a final rule titled, “*Safety Requirements for Operators of Small Passenger-Carrying Commercial Motor Vehicles Used In Interstate Commerce*” (68 FR 47860, August 12, 2003).

⁵ IIHS list of cellphone laws. <http://www.iihs.org/laws/cellphonelaws.aspx>

exemptions, FMCSA has authority to restrict the use of mobile telephones by drivers operating CMVs.

For any violation, such a restriction may be subject to civil penalties imposed on drivers, in an amount up to \$2,750, and on employers, in an amount up to \$11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, paragraphs (a)(3) and (4)). Disqualification of a CMV driver for violations of the Act and its regulations is also within the scope of the Agency's authority under the 1984 Act. Such disqualifications are specified by regulation for other violations (49 CFR 391.15), and were recently adopted by the Agency in its final rule prohibiting texting by CMV drivers while operating in interstate commerce (49 CFR 391.15(e); 75 FR 59118, September 27, 2010). In summary, both a restriction on the use of hand-held mobile telephones and associated sanctions, including civil penalties and disqualifications, are authorized by statute and regulation for operators of CMVs, as defined above, in interstate commerce, with limited exceptions. But before prescribing any regulations under the 1984 Act, FMCSA must consider their costs and benefits (49 U.S.C. 31136(c)(2)(A)).

The 1986 Act (Title XII of Pub. L. 99-570, 100 Stat. 3207-170, Oct. 27, 1986), which authorized creation of the CDL program, is the primary basis for licensing programs for certain large CMVs. There are several key distinctions between the authority conferred under the 1984 Act and that under the 1986 Act. First, the CMV for which a CDL is required is defined under the 1986 Act, in part, as a motor vehicle operating "in commerce," a term separately defined to cover broadly both interstate commerce and operations that "affect" interstate commerce (49 U.S.C. 31301(2) and (4)). Also under the 1986 Act, a CMV means a motor vehicle used in commerce to transport passengers or property that: (1) Has a gross vehicle weight/gross vehicle weight rating of 26,001 pounds or greater; (2) is designed to transport 16 or more passengers including the driver; or (3) is used to transport certain quantities of "hazardous materials," as defined in 49 CFR 383.5 (49 U.S.C. 31301(4)). In addition, a provision in the FMCSRs implementing the 1986 Act recognizes that all school bus drivers (whether government employees or not) and other government employees operating vehicles requiring a CDL (i.e., vehicles above 26,000 pounds, in most States, or designed to transport 16 or more passengers) are subject to the CDL standards set forth in 49 CFR 383.3(b).

There are several statutory and regulatory exceptions from the CDL requirements, which include the following individuals: Military service members who operate a CMV for military purposes (a mandatory exemption for the States to follow) (49 CFR 383.3(c)); farmers; firefighters; CMV drivers employed by a unit of local government for the purpose of snow/ice removal; and persons operating a CMV for emergency response activities (all of which are permissive exemptions for the States to implement at their discretion) (49 CFR 383.3(d)). States may also issue certain restricted CDLs to other categories of drivers under 49 CFR 383.3(e)-(g). Drivers with such restricted CDLs may still be covered by a disqualification under the 1986 Act arising from the use of hand-held mobile telephones while driving CMVs.

The 1986 Act does not expressly authorize the Agency to adopt regulations governing the safety of CMVs operated by drivers required to obtain a CDL. Most of these drivers (those involved in interstate trade, traffic, or transportation) are subject to safety regulations under the 1984 Act, as described above. The 1986 Act, however, does authorize disqualification of CDL drivers by the Secretary. It contains specific authority to disqualify CDL drivers for various types of offenses, whether those offenses occur in interstate or intrastate commerce. This authority exists even if drivers are operating a CMV illegally because they did not obtain a CDL.

In general, the 1986 Act explicitly identifies several "serious traffic violations" as grounds for disqualification (49 U.S.C. 31301(12) and 31310). In addition to the specifically enumerated "serious traffic violations," the 1986 Act provides related authority that allows FMCSA to designate additional serious traffic violations by rulemaking if the underlying offense is based on the CDL driver committing a violation of a "State or local law on motor vehicle traffic control" (49 U.S.C. 31301(12)(G)). The FMCSRs state, however, that unless and until a CDL driver is convicted of the requisite number of specified offenses within a certain time frame (described below), the required disqualification may not be applied (49 CFR 383.5 (defining "conviction" and "serious traffic violation") and 383.51(c)).

Under the statute, a driver who commits two serious traffic violations in a 3-year period while operating a CMV must be disqualified from operating a CMV that requires a CDL for at least 60 days (49 U.S.C. 31310(e)(1)). A driver who commits three or more serious

traffic violations in a 3-year period while operating a CMV must be disqualified from operating a CMV that requires a CDL for at least 120 days (49 U.S.C. 31310(e)(2)). Because use of hand-held mobile telephones results in distracted driving and increases the risk of CMV crashes, fatalities, and injuries, FMCSA is now proposing that violations by a CDL driver of State or local law or ordinance on motor vehicle traffic control that restricts the use of such mobile telephones while driving CMVs should result in a disqualification under this provision.

FMCSA is authorized to carry out these statutory provisions by delegation from the Secretary as provided in 49 CFR 1.73(e) and (g).

C. Support for a Restriction on Mobile Telephones

There is an overwhelming amount of public support for reducing distracted driving, including hand-held mobile telephone use, while operating a CMV. It is likely that most motorists either have first-hand experience with or know someone who had a motor vehicle crash or near-crash event involving a distracted driver. There appears to be a steady increase in the use of electronic devices. Moreover, as outlined in the examples below, there is some evidence that CMV crashes and other incidents have been caused by the use of electronic devices.

FMCSA is aware of several recent CMV crashes in which the use of a mobile telephone may have contributed to the crash. In one case, according to media reports, a truck driver from Arkansas told police she was talking on her cell phone when she became involved in a crash that killed two boys on May 9, 2010. In another media report, on March 26, 2010, a tractor trailer crossed the median strip of Interstate 65 in central Kentucky and collided with a van transporting 9 adults, two children, and an infant. All the adults and the infant in the van and the truck driver were killed. The NTSB is conducting an investigation into the crash, including attempting to determine if a mobile telephone was a factor in the crash.⁸ According to media reports, in February 2010, a Montgomery County, Pennsylvania, school bus driver was allegedly talking on his cell phone before a deadly crash.⁹

In light of these incidents and the potential for more crashes due to

⁸ <http://www.nts.gov/Pressrel/2010/100514.html>.

⁹ *Driver To Stand Trial In Fatal School Bus Crash*. (April 20, 2010) Philadelphia, PA: KYW-TV. Retrieved from the CBS3 Web site, July 21, 2010, from: <http://cbs3.com/local/montgomery.county.school.2.1645628.html>.

distracted driving, FMCSA proposes restrictions on the use of hand-held mobile telephones. We are requesting comments on whether to propose a complete prohibition on mobile telephone use by drivers of CMVs. We have included in this NPRM information on research studies as well as the positions of safety organizations and industry on the use of mobile telephones by CMV drivers.

National Transportation Safety Board Recommendation

On November 14, 2004, a motorcoach crashed into a bridge overpass on the George Washington Memorial Parkway in Alexandria, Virginia. The National Transportation Safety Board (NTSB) determined that one probable cause of the crash was the use of a hands-free cell phone, resulting in cognitive distraction; therefore, the driver did not “see” the low bridge warning signs. This crash was the impetus for an NTSB investigation (NTSB/HAR-06/04 PB2007-916201) and a subsequent recommendation to FMCSA regarding cell phone use by passenger-carrying CMVs.¹⁰ This rulemaking addresses part of this outstanding recommendation.

In a letter to NTSB, dated March 5, 2007, the Agency agreed to initiate a study to assess:

- The potential safety benefits of restricting cell phone use by drivers of passenger-carrying CMVs,
- The applicability of an NTSB recommendation to property-carrying CMV drivers,
- Whether adequate data existed to warrant a rulemaking, and
- The availability of statistically meaningful data regarding cell phone distraction. Subsequently, the report “Driver Distraction in Commercial Vehicle Operations” (VTTI Study (2009)) was published on October 1, 2009. This report is summarized in section D.

Also in 2004, the NTSB investigated a truck-tractor median crossover crash in Sherman, Texas, that resulted in a collision and fire. The NTSB’s report cited one probable cause as the driver’s attempted or imminent use of a wireless device as a distraction from his driving duties.

The Agency will post in the rulemaking docket any additional information it obtains about these

investigations that might not be generally available to the public.

FMCSA’s Motor Carrier Safety Advisory Committee’s Recommendation

Section 4144 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144, 1748 (Aug. 10, 2005), required the Secretary to establish a Motor Carrier Safety Advisory Committee (MCSAC). The committee provides advice and recommendations to the FMCSA Administrator on motor carrier safety programs and regulations and operates in accordance with the Federal Advisory Committee Act (5 U.S.C. App. 2).

In MCSAC’s March 27, 2009, report to FMCSA titled “Developing a National Agenda for Motor Carrier Safety,” MCSAC recommended that FMCSA adopt new Federal rules concerning distracted driving.¹¹ MCSAC reported, “Documented research shows that there are cognitive distractions and increases in crashes from cellular phone use and text messaging.” Therefore, one of MCSAC’s recommendations for the National Agenda for Motor Carrier Safety was that FMCSA initiate a rulemaking to ban the use of hand-held and hands-free mobile telephones while driving.

Motorcoach Safety Action Plan

In the November 2009 DOT Motorcoach Safety Action Plan, DOT identified seven priority action items that will have the greatest impact in reducing motorcoach crashes, injuries, and fatalities. One of these is a recommendation to initiate rulemaking to propose prohibiting texting and limiting the use of mobile telephones and other devices by motorcoach drivers.¹²

Distracted Driving Summit

The information and feedback DOT received during its Distracted Driving Summit, held September 30–October 1, 2009, in Washington, DC, demonstrated both the need and widespread support for a ban against texting and mobile telephone use while driving. Attendees

included safety experts; researchers; elected officials, including four U.S. Senators and several State legislators; safety advocacy groups; senior law enforcement officials; and representatives of the telecommunications and transportation industries. Summit participants shared their expertise, experiences, and ideas for reducing distracted driving behaviors. They addressed the safety risk posed by this growing problem across all modes of surface transportation.

U.S. Transportation Secretary Ray LaHood stated: “Keeping Americans safe is without question the Federal government’s highest priority—and that includes safety on the road, as well as on mass transit and rail.” In addition, the Secretary pledged to work with Congress to ensure that the issue of distracted driving is appropriately addressed.¹³ At the conclusion of the Summit, the Secretary announced a series of concrete actions that the Obama Administration and DOT are taking to address distracted driving, including immediately starting rulemakings that would ban texting and restrict, to the extent possible, the use of mobile telephones by truck and interstate bus operators, as well as to initiate rulemaking by the Federal Railroad Administration (FRA) to codify provisions of the FRA’s Emergency Order No. 26 regarding restricting distracting electronic devices (see discussion below in Part E).

As a follow-up to the Summit, and based on data from studies on distracted driving, FMCSA initiated a number of actions to combat distracted driving by CMV drivers. Specifically, FMCSA issued Regulatory Guidance (75 FR 4305, January 27, 2010) that addressed texting by CMV drivers and issued a final rule (75 FR 59118, September 27, 2010) that prohibits texting by CMV drivers. Finally, DOT held a second Distracted Driving Summit on September 21, 2010,

Safety Advocacy Organizations

Numerous safety advocacy groups voiced support for a prohibition on mobile telephone use while driving. In January 2009, the National Safety Council (NSC) called for a nationwide prohibition on all cell phone use while driving.¹⁴ The NSC is focused on

¹⁰ National Transportation Safety Board (2006) *Motorcoach Collision with the Alexandria Avenue Bridge Overpass, George Washington Memorial Parkway, Alexandria, Virginia, November 14, 2004* (Highway Accident Report NTSB/HAR-06/04; NTIS report number PB2007-916201). Retrieved July 22, 2010, from: <http://www.nts.gov/PublicIn/2006/HAR0604.pdf>.

¹¹ Parker, David R., Chair, Motor Carrier Safety Advisory Committee (March 27, 2009). Letter to Rose A. McMurray, Acting Deputy Administrator, FMCSA, on MCSAC National Agenda for Motor Vehicle Safety. Retrieved July 23, 2010, from: <http://mcsac.fmcsa.dot.gov/documents/MCSACTask09-01FinalReportandLettertoAdministrator090428.pdf>.

¹² U.S. Department of Transportation (November 2009). *Motorcoach Safety Action Plan*. (DOT HS 811 177). Retrieved July 23, 2010, from: http://www.fmcsa.dot.gov/documents/safety-security/MotorcoachSafetyActionPlan_finalreport-508.pdf.

¹³ U.S. Department of Transportation (October 1, 2009). *U.S. Transportation Secretary Ray LaHood Announces Administration-Wide Effort to Combat Distracted Driving* (DOT 156-09). Retrieved July 23, 2010, from: <http://www.dot.gov/affairs/2009/dot15609.htm>.

¹⁴ National Safety Council, (n.d.). *Distracted Driving*. Retrieved July 21, 2010, from: <http://>

alerting the American public to the fact that different distractions have different levels of crash risk. Additionally, Advocates for Highway and Auto Safety (Advocates) applauded DOT's effort to consider banning texting and restricting cell phone use by operators of CMVs. Advocates recently filed a petition for rulemaking requesting consideration of such action on the use of a wide array of electronic devices used by commercial drivers.¹⁵

Transportation Industry Associations Trucking Industry

The American Trucking Associations, Inc. (ATA) adopted a policy supporting the safe use of technologies and encourages drivers and/or motor carriers to consider a range of policies and safeguards intended to reduce, minimize, and/or eliminate driver distractions that may be caused by the increased use of electronic technologies. ATA's policy recommends that manufacturers and others adopt awareness, training, and safety policies on the use of such technologies—unless they are already regulated—while operating a motor vehicle. ATA believes that the use of hand-held electronic devices and the act of texting with such devices while a motor vehicle is in motion should be prohibited.¹⁶ Another one of the initiatives on ATA's safety agenda is their policy on the use of non-integrated technologies while the vehicle is in motion.¹⁷

In fact, many ATA member fleets have already adopted company policies designed to reduce distractions while operating CMVs. Many of these fleets do not allow drivers to operate any electronic devices at all, including dispatching equipment, while the vehicle is moving. ATA conducted an opinion survey of its safety committees

on the use of “non-integrated electronic devices.” From the responses of these industry leaders, ATA found that 67 percent of respondents had a policy restricting or limiting the use of portable electronic devices while driving. United Parcel Service, Inc. has an existing policy of no distractions while behind the wheel (e.g., two hands on the wheel and no two-way communication); and FedEx does not allow drivers to use any electronic device while operating FedEx vehicles.¹⁸ Additionally, ExxonMobil and Shell are examples of large companies that prohibit employees' use of any type of cell phone while driving during work hours.¹⁹ Because numerous large commercial trucking operations already have policies that prohibit the use of portable electronic devices while driving, a restriction on hand-held mobile telephone use is not expected to have a significant adverse impact on trucking fleets.

The Owner-Operators Independent Drivers Association (OOIDA) called upon government entities to aggressively pursue opportunities to educate the motoring public on safe driving practices and encourages law enforcement agencies to fully enforce existing laws pertaining to inattentive or negligent driving.²⁰ The Truckload Carriers Association (TCA) supports the safe use of technologies and encourages drivers and/or motor carriers to consider a range of policies and safeguards intended to reduce, minimize, and/or eliminate driver distractions caused by the increased use of electronic technologies (e.g., global positioning systems, cellular phones, etc.) during the operation of all types of motor vehicles.²¹

Motorcoach Operators

A spokesman for the United Motorcoach Association, which represents tour bus operators, stated that motorcoach operators should not tolerate drivers using mobile telephones unless there is an emergency. The American Bus Association (ABA) supports safety initiatives, and the

safety culture of ABA and its member operators support such bans. ABA's pre-trip passenger safety messaging video instructs passengers, not drivers, to dial 911 in case of emergency. Only in extreme emergencies should drivers ever use a cell phone while operating motorcoaches. Furthermore, ABA asserted that hands-free use of cell phones is no better than hand-held cell phone use, as cognitive distraction is the safety issue in question.²² The ABA also drafted a model policy for members that states in part: “Cell phones and regulated electronic devices (REDs) are not to be used while the vehicle is in motion. Incoming calls or transmissions received on company-provided or authorized cell phones or REDs should go into voicemail and may be checked only when the bus is parked in a safe location.”²³ Numerous large motorcoach and bus operations have already adopted policies that restrict the use of portable electronic devices while driving (many of them are more restrictive than the ABA model policy).

School Bus Operations

School bus operations are the focus of many States and local governments that have implemented distracted driving policies and laws; currently, 19 States and the District of Columbia²⁴ ban school bus drivers from using a mobile telephone while driving. Many cities, towns, and counties prohibit mobile telephone use or texting by school bus operators. The American School Bus Council, whose membership includes: National Association for Pupil Transportation, National Association of State Directors of Pupil Transportation Services, National School Transportation Association, Blue Bird Corporation, IC Corporation, and Thomas Built Buses, recommends prohibiting the use of cell phones or other portable electronic devices—even those equipped with hands-free features—while driving and banning the use of cell phones while supervising the loading and unloading of students.²⁵

www.nsc.org/safety_road/Distracted_Driving/Pages/distracted_driving.aspx.

¹⁵ Gillan, J.S. (October 1, 2009). *Safety Advocates Respond to U.S. DOT Secretary's Announcement on Measures to Reduce Distracted Driving by Commercial Operators*. Retrieved July 21, 2010, from the Advocates for Highway and Auto Safety Web site: <http://www.saferoads.org/files/file/Distracted%20Driving%20Statement%20by%20Judith%20Stone%20October%201,%202009.pdf>.

¹⁶ American Trucking Associations (October 29, 2009). *Addressing the Problem of Distracted Driving*. Written testimony to the Subcommittee on Highways and Transit, U.S. House of Representatives' Transportation and Infrastructure Committee. Retrieved July 21, 2010, from: <http://www.truckline.com/Newsroom/Testimony1/Randy%20Mullett%20-%20Distracted%20Driving%20testimony.pdf>.

¹⁷ Boyce, C. (June 9, 2009) *ATA Unveils Progressive New Highway Safety Agenda*. Retrieved July 21, 2010, from: <http://www.truckline.com/pages/article.aspx?id=541%2F%7b8E1C7279-ED27-4C03-B189-CEEE26BBB12%7d>

¹⁸ Halsey, A. (October 2, 2009). *Obama to Federal Employees: Don't Text and Drive*. *Washingtonpost.com*. Retrieved July 21, 2010, from: http://www.washingtonpost.com/wp-dyn/content/article/2009/10/01/AR2009100103447_pf.html.

¹⁹ Insurance Information Institute (December 2009). *Cellphones and Driving*. Retrieved July 21, 2010, from: <http://www.iii.org/IU/Cellphone-and-driving/>.

²⁰ OOIDA (n.d.). *Distracted Driving*. Retrieved from the OOIDA Web site, July 22, 2010, from: <http://ooida.com/Issues&Actions/Issues/DistractedDriving/distracted-driving.htm>.

²¹ Truckload Carriers Association (March 8, 2009). *Safe Use of Technology*. Retrieved July 21, 2010, from: <http://www.truckload.org/Safe-Use-of-Technology>.

²² Pantuso, P. (October 6, 2009). *Government Seeks Tougher Laws on Distracted Driving*. Retrieved July 21, 2010, from the American Bus Association Web site: [http://www.buses.org/files/MemberAlertTextingCellPhones100509\[1\].pdf](http://www.buses.org/files/MemberAlertTextingCellPhones100509[1].pdf).

²³ ABA Strategic Safety Committee (2010). *Recommended Model Company Policy: Cell Phones and Electronic Devices (REDs)*. Available in the docket for this rulemaking.

²⁴ Vermette, E. (2010). *Curbing Distracted Driving 2010 Survey of State Safety Programs*. Retrieved July 21, 2010, from: http://www.distraction.gov/files/research/GHSA-2010_distraction.pdf.

²⁵ American School Bus Council (February 14, 2007). *American School Bus Council Exceeds NTSB's Recommendation on Cell Phone Use by School Bus Drivers*. Retrieved July 23, 2010, from:

American Public Transportation Association (APTA)

On December 31, 2009, the APTA Bus Safety Working Group published a Recommended Practice regarding employee-controlled distractions while operating a vehicle on agency time. The intent of the voluntary standard is to provide transit agencies with a guideline to develop policies and standard operating procedures regarding operator controlled distractions.²⁶

FMCSA solicits comments about companies' or organizations' policies on drivers' use of mobile telephones and other portable electronic devices while driving CMVs on our Nation's highways.

D. Studies of Mobile Telephone Use While Driving

There are a number of studies from both government and private sources

http://www.americanschoolbuscouncil.org/uploads/pdf/Guidelines_Release.pdf.

²⁶ APTA Bus Safety Working Group (December 31, 2009). *Reducing Driver-Controlled Distractions While Operating a Vehicle on Agency Time*. Retrieved from the American Public Transportation Association Web site, July 23, 2010, from: http://www.aptastandards.com/Portals/0/Bus_Published/APTA-BTS-BS-RP-005-09_employee_controlled_distractions.pdf.

related to distracted driving. However, there are few studies of distracted driving that focus on the CMV driver. The following peer-reviewed studies were considered while developing this NPRM. These studies use different methodologies to analyze driver distraction. There are advantages and disadvantages to each methodology as follows:

- *Simulator studies*, and to some extent test-track studies, allow for experimental control over and measurement of the cognitive distractions, such as the type of phone conversation. These studies may have unrealistic driving and cell phone use conditions because they are not conducted on public roadways and therefore lack many of the risks associated with real world driving;

- *Naturalistic driving studies* use cameras and instrumentation in participants' vehicles to provide a clear picture of driver distraction under real-world driving conditions. However, these studies may have a small sample size of some of the individual distractions.

Overall, it is important to keep these differences in mind while comparing the results from different research

methods. Regardless, these studies illustrate degradations in driver performance due to the effects of driver distraction.

Driver Distraction in Commercial Vehicle Operations²⁷

Under contract with FMCSA, the Virginia Tech Transportation Institute (VTTI) completed the study titled, "Driver Distraction in Commercial Vehicle Operations," and released the final report on October 1, 2009. The purpose of the VTTI Study (2009) was to investigate the prevalence of driver distraction in CMV safety-critical events recorded in a naturalistic data set that included over 200 truck drivers and data from 3 million miles of operations. Of the 4,452 safety-critical events noted in the combined data, 60 percent had some type of non-driving related task listed as a potential contributing factor. Safety-critical events are crashes, near-crashes, crash-relevant conflicts, and unintentional lane deviations.

²⁷ Olson, R.L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009). *Driver Distraction in Commercial Vehicle Operations*. (Document No. FMCSA-RRR-09-042) Washington, DC: FMCSA, July 2009. Retrieved July 26, 2010, from: <http://www.fmcsa.dot.gov/facts-research/research-technology/report/FMCSA-RRR-09-042.pdf>.

Table 1

Odds Ratio, Population Attributable Risk Percentage, and Eyes Off Forward Roadway by Selected Task

Task	Odds Ratio	Population Attributable Risk Percentage*	Eyes Off Forward Roadway**
Complex Non-Driving Related Task			
Text message on cell phone	23.2	0.7	4.6
Other – Complex (e.g., clean side mirror)	10.1	0.2	4.4
Interact with/look at dispatching device	9.9	3.1	4.1
Write on pad, notebook, etc.	9.0	0.6	4.2
Use calculator	8.2	0.2	4.4
Look at map	7.0	1.1	3.9
Dial cell phone	5.9	2.5	3.8
Read book, newspaper, paperwork, etc.	4.0	1.7	4.3
Moderate Non-Driving Related Task			
Use/reach for other electronic device	6.7	0.2	4.1
Other – Moderate (e.g., open medicine bottle)	5.9	0.3	3.3
Personal grooming	4.5	0.2	3.7
Reach for object in vehicle	3.1	7.6	2.9
Look back in sleeper berth	2.3	0.2	3.4
Talk or listen to hand-held phone	1.0	0.2	1.3
Eating	1.0	0	2.4
Talk or listen to CB radio	0.6	*	1.3
Talk or listen to hands-free phone	0.4	*	1.6

* Calculated for tasks where the odds ratio is greater than one.

** Number of seconds out of a 6 second interval.

The VTTI Study (2009) separately examined the different sub-tasks associated with cell phone use. Although talking on the cell phone did not show an increased risk, as seen in Table 1, a driver must take several risk-increasing steps in order to use the electronic device for conversation. In particular, as also shown in Table 1, the use of a cell phone involves a variety of sub-tasks, including reaching for and holding the phone, performing the visually complex process of manually dialing the phone, and then carrying out the conversation. In FMCSA's view, the risk associated with cell phone use should be viewed as a series of related sub-tasks, not all having equal risk. The odds of being involved in a safety-critical event are three times greater while the driver is reaching for an object than when the driver is not reaching for an object. The odds of being involved in

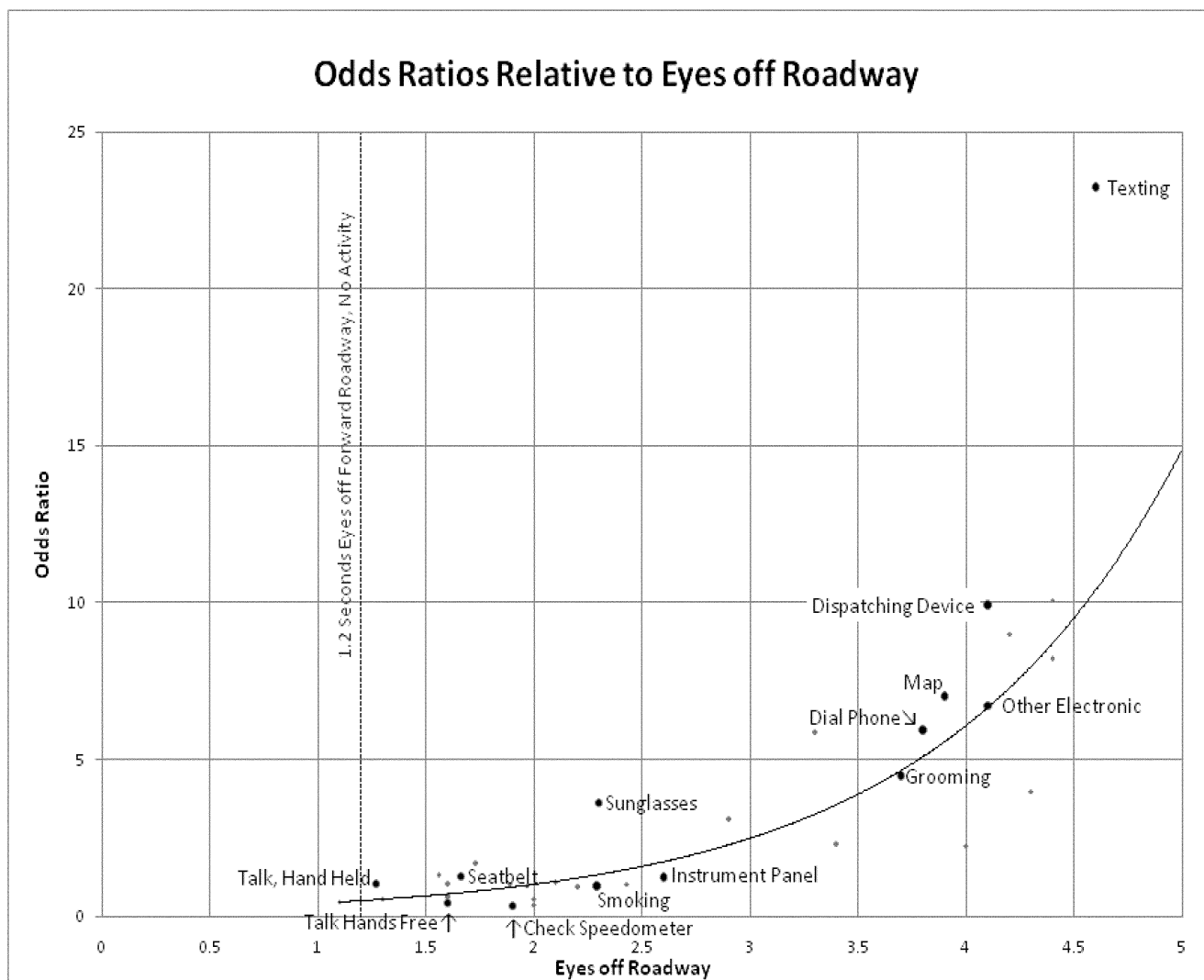
a safety-critical event are six times greater while the driver is dialing a cell phone than when the driver is not dialing a cell phone. But, according to the VTTI study, the odds of being involved in a safety critical event while talking or listening to a hand-held or hands-free phone do not show an increased risk.

In addition, the population attributable risk (PAR) incorporates the frequency of engaging in a non-driving related task by the population of drivers. If a task is done more frequently by a large population of drivers, it will have a greater PAR percentage. High PAR percentages occurred for commonly performed tasks (*i.e.*, a task, which if removed, would increase safety most). The PAR percentage for reaching for an object was the highest in the study at 7.6 percent. In other words, there would be 7.6 percent fewer safety-critical events, if reaching for an object while driving

never occurred. The risk of being involved in a safety-critical event was greater for other distracting activities, but the prevalence of the distractions was greatest for reaching for an object. In contrast, the PAR for talking on a hand-held phone was relatively low, at 0.2 percent, and the PAR was not calculated for talking on a hands-free cell phone.

FMCSA constructed a diagram that shows the relationship between the odds ratios of various activities conducted while driving and their associated eyes-off-roadway times. As seen in Diagram 1 (constructed from data in the VTTI study), those tasks that drew the driver's eyes away from the forward road led to a significant increase in risk. For example, texting, dialing, using other electronic devices, reading a map or grooming stand out as risky tasks.

Diagram 1- Odds Ratios Relative to Eyes off Roadway



Source: FMCSA-constructed. Based on VTTI Study (2009).

During the 3.8 seconds the driver has his eyes off the forward roadway while dialing his mobile telephone, at 55 miles per hour, the CMV travels about the length of a football field, 306 feet.

A complete copy of the final report for the VTTI Study (2009) is included in the docket referenced in the beginning of this rulemaking notice.

Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction With Crashes and Near-Crashes²⁸

The purpose of this research was to conduct an analysis of naturalistic data collected by DriveCam®. The

introduction of naturalistic driving studies that record drivers (through video and kinematic²⁹ vehicle sensors) in actual driving situations created a scientific method to study driver behavior under the daily pressures of real-world driving conditions.

The research documented the prevalence of distractions while driving a CMV, including both trucks and buses, using an existing naturalistic data set. This data set came from 183 truck and bus fleets comprising a total of 13,306 vehicles captured during a 90-day period. There were 8,509 buses and 4,797 trucks. The data sets in the current study did not include continuous data; they only included

recorded events that met or exceeded a kinematic threshold (a minimum g-force setting that triggers the event recorder). These recorded events included safety-critical events (e.g., hard braking in response to another vehicle) and baseline events (i.e., an event that was not related to a safety-critical event, such as a vehicle that traveled over train tracks and exceeded the kinematic threshold). A total of 1,085 crashes, 8,375 near-crashes, 30,661 crash-relevant conflicts, and 211,171 baselines were captured in the data set.

Odds ratios were calculated to show a measure of association between involvement in a safety-critical event, which includes crashes, and performing a non-driving related task. The odds ratios show the odds of being involved in a safety critical event when a non-driving related task is present compared

²⁸ Hickman, J., Hanowski, R., & Bocanegra, J. (2010). *Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction With Crashes and Near-Crashes*. Washington, DC: FMCSA.

²⁹ Kinematics is a branch of physics that deals with the motion of a body or system without reference to force and mass.

to when there is no non-driving related task. The non-driving related task, "any cell phone usage," includes all the specific cell phone sub-tasks, such as reaching for, dialing, talking or listening to a hand-held or hands-free cell phone.

Drivers increased their odds of involvement in a safety-critical event by 1.14 times for "any cell phone usage" while driving. However, when the cell phone task was disaggregated into sub-tasks, the study results show that the sub-tasks involved with using a cell phone have different risks, some increasing and some decreasing the odds of involvement in a safety-critical event. The odds of involvement in a safety critical event increased significantly when truck and bus drivers performed certain non-driving related tasks:

- Reaching for a cell phone while driving increased the odds by 3.7 times;
- Dialing a cell phone while driving increased the odds by 3.5 times;
- Reaching for a headset/earpiece increased the odds by 3.4 times.

Drivers decreased the odds of being involved in a safety-critical event by .65 times while talking or listening on a hands-free cell phone. However, the odds ratio for talking/listening should not ignore the fact that a person usually has to reach for and dial a cell phone in order to talk or listen. Both consuming food/drink and talking/listening on a hand-held cell phone (odds ratios = 1.11 and 0.89, respectively) had non-significant odds ratios (*i.e.*, no increase or decrease in risk).

The Impact of Cognitive Distraction on Driver Visual Behavior and Vehicle Control

While conclusive evidence is still lacking, several studies focused on cognitive distraction and its influence on driver performance. Harbluk, Noy, and Eizenman (2002) examined the impact of cognitive distraction on drivers' visual behavior and vehicle control.³⁰ This instrumented-vehicle study examined changes in drivers' visual scanning driving patterns under three tasks varying in cognitive complexity: no distraction, an easy cognitive task (*i.e.*, simple addition), and a difficult cognitive task (*i.e.*, difficult addition). As predicted, drivers had significantly increased hard-braking events under distracted driving conditions. Interestingly, under

distracted driving conditions, drivers made fewer eye movements, spent more time focusing on the central visual field, and spent less time scanning the right periphery. This suggests that visual scanning collapses to a minimal level under distracted driving conditions, increasing the risk that a driver will miss a critical event.

A Decrease in Brain Activation Associated With Driving When Listening to Someone Speak

Just, Keller, and Cynkar (2008) used functional magnetic resonance imaging (MRI) to investigate the impact of concurrent auditory language comprehension on the brain activity associated with a simulated driving task.³¹ Participants steered a vehicle along a curving virtual road, either undisturbed or while listening to spoken sentences that they judged as true or false. The study was designed to assess the neural effect of listening while driving, similar to listening to a cell phone while driving. The central findings were that the sentence listening task reliably degraded driving performance. The behavioral measures indicated reliably more road-maintenance errors and larger deviation from an ideal path in the driving with listening condition. The findings show that language comprehension performed concurrently with driving draws mental resources away from the driving and produces deterioration in driving performance, even when it is not accompanied by holding or dialing a phone.

The Distraction Effects of Phone Use During a Crucial Driving Maneuver

A study by Hancock, Lesch, and Simmons (2003)³² examined the effect of drivers on a test track responding to an in-vehicle phone at the same time they were faced with making a crucial stopping decision. The most crucial finding was the variation in stopping accuracy in the presence of the phone distraction task, from 95 percent accuracy without distraction to 80

³¹ Just, M.A., Keller, T.A., & Cynkar, J. (2008). A Decrease in Brain Activation Associated With Driving When Listening to Someone Speak. *Brain Research*. Retrieved July 26, 2010, from: <http://www.distraction.gov/files/research/carnegie-mellon.pdf>.

³² Hancock, P. A., Lesch, M., & Simmons, L. (2003). The Distraction Effects of Phone Use During a Crucial Driving Maneuver. *Accident Analysis and Prevention*, 35(4), 501–514. Retrieved July 26, 2010, from: http://www.sciencedirect.com/science?_ob=MIimg&_imagekey=B6V5S-45SH77V-1-20&_cdi=5794&_user=3928936&_pii=S0001457502000283&_orig=search&_coverDate=07%2F31%2F2003&_sk=999649995&view=c&wchp=dGLzVtb-zSkWb&md5=b40e15505a9c7b04bd3c6aa3c42a5777&ie=/sdarticle.pdf.

percent with distraction, a significant 15 percentage point reduction. The study shows there is a detrimental impact of a coincident in-vehicle phone task on a critical driving maneuver.

Passenger and Cell Phone Conversations in Simulated Driving

Drews, Pasupathi, and Strayer (2008) examined in a simulator study how conversing with passengers in a vehicle differs from conversing on a cell phone while driving.³³ The results show that the number of driving errors was highest when the driver was conversing on a cell phone while driving. Passenger conversations made more references to traffic. In addition, drivers' speech production rate (measured in syllables per second) and the drivers' and passengers' speech complexity rate (measured in syllables per word of speech) dropped in response to an increase in the demand of the traffic. Overall, the study found that cell phone use negatively impacts lane keeping, increases the following distance, and leads to impairment of a navigation task, while passenger conversations have little effect on all of the three measures.

Request for Additional Research or Data

Overall, these studies illustrate degradations in driver performance due to the effects of driver distraction. The studies do not necessarily break down the individual components of mobile telephone use like the VTTI study does. However, they suggest certain risks when using a mobile telephone. Commenters are encouraged to provide other research or data that would enable the Agency to better assess the risk associated with mobile telephone use by CMV drivers while operating their vehicles.

E. Existing Mobile Telephone Bans by Federal, State, and Local Governments

Federal

On October 7, 2008, FRA published Emergency Order 26 (73 FR 58702). Pursuant to FRA's authority under 49 U.S.C. 20102 and 20103, the order, which took effect on October 27, 2008, restricts railroad operating employees from using distracting electronic and electrical devices while on duty. Among other things, the order prohibits both the use of mobile telephones and texting by railroad operating employees. FRA cited numerous examples of the adverse impact that electronic devices can have

³³ Drews, F.A., Pasupathi, M., & Strayer, D.L. (2008). Passenger and Cell Phone Conversations in Simulated Driving. *Journal of Experimental Psychology: Applied*, 14(4). Retrieved July 26, 2010, from: <http://www.psych.utah.edu/lab/appliedcognition/publications/passenger.pdf>.

³⁰ Harbluk, J. L., Noy, Y. I., & Eizenman, M. (2002). *The Impact of Cognitive Distraction on Driver Visual Behavior and Vehicle Control* (Report No. TP 13889E). Ottawa: Transport Canada. Retrieved July 26, 2010, from: <http://people.usd.edu/~schieber/materials/trans-canada-13889.pdf>.

on safe operations. These examples included fatal crashes that involved operators who were distracted while texting or talking on a mobile telephone. In light of these incidents, FRA proposed to amend its railroad communications regulations by restricting use of mobile telephones and other distracting electronic devices by railroad operating employees. FRA published its final rule in the **Federal Register** on September 27, 2010 (75 FR 59580).

On September 27, 2010, FMCSA also published a final rule (75 FR 59118) that prohibits texting on electronic devices, including mobile telephones, while driving a CMV. This rulemaking action addressed one of the riskiest distracted driving behaviors. Furthermore, on September 27, 2010, the Pipeline and Hazardous Materials Safety Administration published a notice of proposed rulemaking (75 FR 59197) that addressed distracted activities by drivers under its authority.

States

Nine States and the District of Columbia have traffic laws prohibiting all motor vehicle drivers from using a hand-held mobile telephone while driving. School bus drivers are currently prohibited from any mobile telephone use in 19 States and the District of Columbia. A list of these States can be found at the following Web site: <http://www.iihs.org/laws/cellphonelaws.aspx>. Generally, the State traffic laws are applicable to all drivers operating motor vehicles within those jurisdictions, including CMV operators. Some States are already tracking enforcement. For example, since March of 2008, when New Jersey's wireless hand-held telephone and electronic communication device ban became effective, more than 224,000 citations—an average of almost 10,000 a month—were issued to motorists violating this cell phone law.

Additionally, as part of its continuing effort to combat distracted driving, DOT kicked off pilot programs in Hartford, Connecticut, and Syracuse, New York, to test whether increased law enforcement efforts can get distracted drivers to put down their mobile telephones and focus on the road. During 1 week of the pilot program in Hartford, police cited more than 2,000 drivers for talking on mobile telephones and 200 more for texting while driving.

Public Transportation Agencies

The severity of the problem of distracted driving led public transportation agencies to ban the use of

mobile telephones/electronic devices while an operator is driving a vehicle in passenger service. In the period from May 2008 to May 2009, after the Massachusetts Bay Transportation Authority (MBTA) issued its cell phone ban, 12 bus drivers employed by the MBTA were suspended and one bus driver was fired for using a cell phone while on duty.

Most transit agencies allow operators to carry cell phones or other electronic devices in backpacks, purses, or bags, and to use them outside the vehicle during breaks and layovers and during emergencies. However, many large transit agencies prohibit operators from carrying cell phones or other electronic devices in the cab. Examples of policies at public transportation agencies include the following:

- **MBTA.** The MBTA banned cell phone use by drivers while on the job, with penalties escalating from a 3-day suspension after one offense, to a 10-day suspension after two, and dismissal for the third offense. Engineers on commuter-rail trains operated by a private contractor are also prohibited from having a cell phone or other device on their person.³⁴
- **Chicago Transit Authority (CTA).** The CTA's zero tolerance policy prohibits employee use of electronic devices while operating buses and trains. This policy prohibits the use of cell phones, smart phones, personal digital assistants (PDAs), MP3/music players, wireless headsets, or any other appliance or device. Having possession of an electronic device results in probation and a 3-day suspension. Use of the device while on duty may lead to discharge.³⁵
- **Greater Cleveland Regional Transit Authority (GCRTA).** All employees are prohibited from having a cell phone on their person while operating a bus or train at the GCRTA. The prohibition includes: Cell phones; smart phones; PDAs, electronic music devices; wireless headsets; or any other electronic communication or listening devices. While on duty, operators must keep cell phones and other devices separate from their person. They may be stored on-board in personal bags or purses. Cell phones may only be used when the operator is on layover, the vehicle is stopped, the parking brake is set, and he/she has left the driver's seat. Employees will be terminated for a first offense.³⁶

³⁴ Massachusetts Bay Transportation Authority (June 7, 2009). Cell Phone Ban Expanded. Retrieved July 26, 2010, from the MBTA Web site: http://www.mbta.com/about_the_mbta/news_events/?id=17461&month=8&year=.

³⁵ Chicago Transit Authority (August 5, 2009). CTA Adopts Zero Tolerance Policy on Employee Use of Electronic Devices While On-Duty. Retrieved July 26, 2010, from the CTA Web site: <http://www.transitchicago.com/news/default.aspx?Archive=y&ArticleId=2427>.

³⁶ Greater Cleveland Regional Transit Authority (September 18, 2009) RTA Strengthens Cell Phone Policy. Retrieved July 26, 2010, from the GCRTA Web site: http://www.riderta.com/nu_newsroom_releases.asp?listingid=1345.

While FMCSA is aware that many organizations have policies on mobile telephone use, FMCSA solicits further comments on mobile telephone use policy and enforcement and on the applicability of State laws and local ordinances to school bus drivers and transit employees.

IV. Discussion of Proposed Rule

Federal Restriction of Mobile Telephone Use by Interstate CMV Drivers

In light of the available studies, and to partially address the NTSB and MCSAC recommendations, the Agency proposes a restriction on the use of hand-held mobile telephones by CMV drivers operating in interstate commerce. This rulemaking would prohibit a CMV driver from reaching for, holding, and dialing a mobile telephone in order to conduct a voice communication while driving. Essentially, the CMV driver must be ready to conduct a voice communication in compliance with the proposed rule the moment he begins driving the vehicle. The proposed rule would include definitions related to the restriction. It also would add a driver disqualification provision for interstate CMV drivers. A driver disqualification provision would also be included for CDL holders convicted of two or more violations of State or local traffic laws or ordinances on motor vehicle traffic control concerning hand-held mobile telephone use.

This NPRM would amend regulations in 49 CFR parts 383 and 384 concerning the Agency's CDL regulations, part 390 concerning general applicability of the FMCSRs, part 391 concerning driver qualifications and disqualifications, and part 392 concerning driving rules. In general, the proposed requirements are intended to reduce the risks of distracted driving by restricting hand-held mobile telephone use by a driver who is operating a CMV in interstate commerce.

For CMV drivers operating in interstate commerce, the proposed rule would: (1) Restrict the use of hand-held mobile telephones; and (2) provide sanctions for those drivers convicted of using a hand-held mobile telephone while operating a CMV in interstate commerce, including civil penalties and/or disqualification from driving a CMV for a specified period of time. In addition, the proposed rule would provide sanctions for CDL holders convicted of violating a State or local law or ordinance on motor vehicle traffic control restricting the use of a hand-held mobile telephone while operating any CMV—specifically, a

disqualification for a specified period of time from operating any CMV requiring a CDL.

The proposed rule would also require interstate motor carriers to ensure compliance by their drivers with the restrictions on use of a hand-held mobile telephone while driving a CMV. Motor carriers would be prohibited from requiring or allowing drivers of CMVs to use a hand-held mobile telephone while operating in interstate commerce.

As indicated above, FMCSA proposes that any CDL holder operating a CMV (as defined in § 383.5) who is convicted of violating a State or local traffic law or ordinance on motor vehicle traffic control restricting or prohibiting hand-held mobile telephone use while driving a CMV would be disqualified for 60 days after a second conviction and 120 days after a third or subsequent conviction within a 3-year period.³⁷ State or local laws or ordinances restricting or prohibiting hand-held mobile telephone use would be added to the list of “serious” traffic offenses under § 383.51(c). The disqualifying serious traffic offense would be applicable to all persons who are required to possess a CDL, in accordance with the requirements of 49 CFR part 383, and who are subject to a State or local law or ordinance restricting or prohibiting hand-held mobile telephone use while driving. Therefore, the amendment to the CDL rules would be applicable to CMV drivers employed by Federal, State, or local government agencies, transit authorities, and school districts.

Other Technologies

It is not FMCSA’s intention to limit current or future innovative technologies that could allow safe and effective, completely hands-free, voice communication. Because of the lack of information about the availability of completely hands-free technology for CMV drivers’ work environment, FMCSA is unable to analyze their safety and economic or environmental impacts. The Agency is proposing to allow hands-free mobile telephone use as long as it does not require the driver to reach for, dial, or hold a mobile telephone, taking the driver’s eyes off the forward roadway and a hand off the wheel. We request comments on this rationale as well as whether true hands-free mobile telephones exist for use in the CMV operating environment, whether they are safe to use while driving a CMV, or whether they should

be banned as well. The Agency is also interested in receiving public comments and acquiring further knowledge about innovative technologies, either those that exist today or that are under development, including the practicability of their application and use in CMVs and their safety and economic or environmental impact. FMCSA notes that the use of Citizens Band (CB) radios is not restricted in this proposed rule. CB radios are not included in this proposed rule because they do not fall under the definition of “commercial mobile radio services” as defined by the FCC. The NPRM should not be construed as a proposal to restrict the use of mobile telephones by drivers when they are not driving.

With significant national awareness now focused on the issue of distracted driving, the Agency hopes that important safety gains can be achieved as a result of this increased attention on the use of mobile telephones by drivers operating CMVs. Although fleet management systems and electronic dispatching tools are used by many of the Nation’s largest CMV fleets, the Agency believes safety-conscious fleet managers would neither allow nor require their drivers operating CMVs to use these devices or hand-held mobile telephones while driving.

Applicability to Federal, State, or Local Government Employees

FMCSA’s proposed explicit restriction on using a hand-held mobile telephone while driving a CMV would apply to CMV drivers covered under 49 CFR Part 392, but the requirements of Part 392 would not be applicable to Federal, State, or local government-employed drivers of CMVs in interstate commerce. Those drivers are statutorily exempt from nearly all of FMCSA’s safety regulations. However, the Agency proposes to make amendments to its disqualifying offenses for such CDL drivers if they are convicted, while driving a CMV, of violating a State or local law or ordinance on motor vehicle traffic control that restricts or prohibits the use of hand-held mobile telephones while driving. The Agency’s amendments to the CDL regulations would be applicable to Federal, State, or local government-employed drivers of CMVs who are required to possess a CDL.

The proposed rule would also be applicable to transit employees employed by Federal, State, and local governments who are required to possess a CDL.

Section-by-Section Analysis

Section 390.3³⁸

The Agency proposes to modify several discretionary regulatory exemptions concerning the applicability of the existing FMCSRs, including one for school bus operations and one for CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation (49 CFR 390.3(f)(1) and (6)). The Agency finds that this action is necessary for public safety regarding school bus transportation by interstate motor carriers, a finding required by the applicable statutory provisions, as explained above in the legal authority section. In addition, the Agency determined that in order to enhance public safety to the greatest extent possible, the rule should apply to the operation by drivers of small-passenger carrying vehicles (designed to transport 9–15 passengers) who are not receiving direct compensation, which are otherwise exempt from most of the FMCSRs under 49 CFR 390.3(f)(6).

Section 390.5

The Agency proposes to amend 49 CFR 390.5 by adding new definitions for the terms “mobile telephone” and “using a hand-held mobile telephone,” for general application. A broad definition of the term mobile telephone is proposed because of the wide variety of radio telephone services, in addition to cell phone services, that are licensed by the Federal Communications Commission (FCC) and might be available for use in a CMV. “Mobile telephone” could include, for example, a satellite telephone service, a broadband radio service, or a personal communications system. Using such wireless communication services is just as distracting to a CMV driver as using a cell phone. The FCC classifies these services as “commercial mobile radio services,” which are incorporated into the definition of mobile telephone. It does not include two-way or Citizens Band radio.

In this rulemaking, FMCSA proposes to define “using a hand-held mobile telephone” to clarify that certain uses of a hand-held mobile telephone are restricted, including reaching for,

³⁷ Although the statute (in 49 U.S.C. 31310(e)) authorizes disqualifications of “at least” 60 or 120 days, the proposed rule follows the existing structure in the FMCSRs and provides for disqualifications of exactly 60 or 120 days.

³⁸ The proposed rules in this NPRM are numbered and placed in relation to the rules currently in effect and published in the Code of Federal Regulations (CFR). The Agency has issued an NPRM addressing texting while driving a CMV, which proposes similar definitions, and analogous prohibitions and disqualifications (75 FR 16391, April 1, 2010). The numbering and placement of any final regulations that result from this rulemaking will be adjusted appropriately to reflect any final rules adopted in other rulemakings.

dialing, and holding the mobile telephone to conduct voice communication. The Agency recognizes that mobile telephones often have multi-functional capability and is not prohibiting the use of mobile telephones for other uses. Of course, other types of activities using a mobile telephone might be covered by other rules proposed by FMCSA, such as those addressing texting while driving a CMV. To be consistent with these new definitions, FMCSA proposes removing exception (2)(i) from the existing definition of “texting” in this section.

Section 391.2

FMCSA proposes to amend 49 CFR 391.2, which provides certain exceptions to the requirements of part 391 for custom farm operations, aparian industries, and specific farm vehicle drivers, to enable the Agency to make violations of the Federal mobile telephone restriction a disqualifying offense for such drivers. While the proposed explicit Federal restriction against hand-held mobile telephone use applies directly to these drivers, the disqualification provision in proposed § 391.15(f) below would not apply without this amendment to the current exceptions under 49 CFR 391.2.

Section 391.15

FMCSA proposes to add a new paragraph (f) to 49 CFR 391.15 entitled “Disqualification for violation of restriction on using a hand-held mobile telephone while driving a commercial motor vehicle.”³⁹ This provision would provide for the disqualification from operating a CMV in interstate commerce of any driver convicted of two or more violations within a 3-year period of the new hand-held mobile telephone use restriction while operating a CMV as set forth in proposed § 392.82. For the driver’s first hand-held mobile telephone use conviction, the Agency could assess a civil penalty against the driver. If a driver is convicted of committing a second hand-held mobile telephone use violation within 3 years, he or she would be disqualified for 60 days, in addition to being subject to the applicable civil penalty. For three or more hand-held mobile telephone use convictions for violations committed within 3 years, a driver would be disqualified for 120 days, in addition to being subject to the applicable civil penalty. This proposed change to the disqualifying offenses for interstate

drivers would mirror the Agency’s corresponding proposed new provisions governing the disqualification offenses for CDL drivers in § 383.51(c). The required number of convictions to cause a disqualification by FMCSA and the period of disqualification would be the same: 60 days for the second offense within 3 years and 120 days for three or more offenses within 3 years. In addition, the first and each subsequent violation of such a restriction or prohibition by a driver would be subject to civil penalties imposed on such drivers, in an amount up to \$2,750 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and Appendix B, A(4)).

Section 392.82

In this section, the Agency proposes a new restriction on using a hand-held mobile telephone while driving a CMV. Furthermore, this proposed section states that motor carriers must not allow or require CMV drivers to use a hand-held mobile telephone while driving. The Agency would also include a provision in this proposed section to apply this new hand-held mobile telephone restriction to “school bus operations notwithstanding the general exception in 49 CFR 390.3(f)(1).” Thus, school bus drivers who are employed by non-government entities and who transport school children and/or school personnel between home and school in interstate commerce would be subject to this proposed section. The Agency determined that this proposed section is necessary for public safety regarding school bus transportation by interstate motor carriers. In addition, the proposed rule would apply to the operation of CMVs designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, notwithstanding the exception in 49 CFR 390.3(f)(6). The proposed section would also require employers to ensure compliance by their drivers with the restrictions on use of a hand-held mobile telephone while driving a CMV. Any violation by an employer would be subject to civil penalties in an amount up to \$11,000 (49 U.S.C. 521(b)(2)(A), 49 CFR 386.81 and part 386 Appendix B, paragraph (a)(3)).

A definition of “driving a commercial motor vehicle” would be incorporated into the restriction on using a hand-held mobile telephone while driving, in the proposed new § 392.82, in order to confine the use of that term to the restriction and the related disqualification and to avoid limiting the scope of the same term as used in other provisions of the FMCSRs.

The Agency proposes to add a limited exception to the hand-held mobile

telephone restriction to allow CMV drivers to use their hand-held mobile telephones if necessary to communicate with law enforcement officials or other emergency services.

Federal Disqualification Standard for CDL Drivers

Any CDL driver operating a CMV (as defined in § 383.5) who is convicted of violating a State or local motor vehicle law or ordinance that prohibits or restricts the use of a hand-held mobile telephone while driving a CMV would be disqualified after his or her second conviction for the hand-held mobile telephone offense or any other serious traffic violation (as defined by § 383.51(c)). The CDL disqualifying offense would be applicable to all persons who are required to possess a CDL, in accordance with the requirements of 49 CFR part 383, and who are subject to a State or local law or ordinance prohibiting or restricting the use of a hand-held mobile telephone while driving, when the offense occurs during the operation of a CMV. Therefore, the amendment to the CDL rules is applicable to drivers employed by Federal, State, or local government agencies, transit authorities, and school districts. To assist in the application of the provisions for disqualification, the regulations include definitions of the words “mobile telephone” and “using a hand-held mobile telephone.”

Section 383.5

The Agency proposes to add new definitions for the terms “mobile telephone” and “using a hand-held mobile telephone.” The Agency proposes a broad definition of mobile telephones based on the FCC regulations to cover the multitude of devices that allow users to send or receive voice communication while driving. The definitions of “mobile telephone” and “using a hand-held mobile telephone” would identify the type of activity that would be restricted by this proposed rule. To be consistent with these new definitions, FMCSA proposes removing exception (2)(i) from the definition of “texting” in this section.

Section 383.51

In Table 2 of 49 CFR 383.51(c), FMCSA would add a new serious traffic violation that would result in a CDL driver being disqualified. This serious traffic violation would be a conviction for violating a State or local law or ordinance restricting hand-held mobile telephone use while driving a CMV. For the purpose of this disqualification, the Agency proposes to use the same description of “driving” that is already

³⁹ The texting NPRM, cited above, proposed to add a new paragraph (e) to this section. Therefore, paragraph (e); is reserved in this NPRM for possible use by this Agency for another rulemaking.

in the table for the texting disqualification (§ 383.51(c)(9)). FMCSA notes that the conviction must involve “using a hand-held mobile telephone” while operating a CMV and excludes convictions for hand-held mobile telephone use by a CDL driver while operating a vehicle for which such a CDL is not required. The Agency’s decision is consistent with the provisions of 49 U.S.C. 31310(e), which indicates the serious traffic violation must occur while the driver is operating a CMV that requires a CDL; the operative provisions in the revised table would limit the types of violations that could result in a disqualification accordingly.

As proposed, every State that issues CDLs would be required to impose this disqualification on a driver required to have a CDL issued by that State whenever that CDL driver was convicted of the necessary number of violations while operating in States where such conduct is restricted or prohibited by a State or local traffic law. Section 384.301

A new paragraph (f) is proposed to be added to § 384.301. It would require all States that issue CDLs to implement the new provisions proposed in part 383 that relate to disqualifying CDL drivers for violating the new serious traffic violation of using a hand-held mobile telephone while driving a CMV as soon as practical, but not later than 3 years after this proposed rule is implemented.

Impact on States

Motor Carrier Safety Assistance Program (MCSAP)

Under MCSAP, States that receive grant funds would be required, as a condition of receiving the grants, to adopt regulations on the hand-held mobile telephone restriction that are compatible with final Federal regulations issued as a result of this rulemaking (49 U.S.C. 31102(a) and 49 CFR 350.201(a)). If a restriction of hand-held mobile telephone use (such as proposed in § 392.82) and the related disqualification (such as proposed in § 391.15(f)) are adopted by FMCSA, States under MCSAP would need to adopt compatible regulations applicable to both interstate and intrastate transportation as soon as practicable, but not later than 3 years thereafter (49 CFR 350.331(d)). If States do not adopt compatible regulations restricting hand-held mobile telephone use while driving a CMV and related disqualifications, they may not receive full MCSAP grant funding.

CDL Program

States that issue CDLs to CMV drivers would be required to adopt and implement the proposed CDL disqualification provisions that require disqualification for two or more convictions of violating a State or local law or ordinance restricting or prohibiting hand-held mobile telephone use while driving a CMV. States should be in compliance with this hand-held mobile telephone disqualification as soon as practicable, but not later than 3 years after the Agency adopts the disqualification provisions. If they do not comply with this provision, they may be subject to the loss of up to 5 percent in the first year of substantial non-compliance and up to 10 percent in subsequent years of certain Federal-aid highway amounts apportioned to the State (49 U.S.C. 31311(a) and 31314).

Impact on Other State Laws— Preemption

At present, only nine States and the District of Columbia restrict or prohibit hand-held mobile telephone use while driving a motor vehicle within their jurisdictions. FMCSA believes that there is a need for a Federal regulation to address the safety risks associated with hand-held mobile telephone use by CMV drivers nation-wide. The Federal restriction would provide uniform language applicable to CMV drivers engaged in interstate commerce, regardless of the presence or absence of a State law or regulation. State laws and regulations that are compatible with the Federal requirements we are proposing today, or that have a safety benefit or do not create an undue burden upon interstate commerce in conformity with 49 U.S.C. 31141 and 49 CFR 350.333, would remain in effect and could continue to be enforced with regard to CMV drivers. Future actions by the States to institute new restrictions or prohibitions on any form of mobile telephone use while driving CMVs in interstate commerce would be governed by the same principles. For more information see the Federalism section later in this document.

The States receiving MCSAP grants would be required, as a condition of receiving the grants, to adopt, at a minimum, regulations compatible with any adopted Federal restriction on use of a hand-held mobile telephone while driving CMVs in interstate commerce, in accordance with the requirements of 49 CFR 350.333.

Questions and Request for Comments

In order to make an informed decision on all of these issues related to mobile

telephone use, the Agency requests review and comment on some specific questions:

1. Should the Agency completely restrict all mobile telephone use, both hand-held and hands-free, by CMV drivers while driving in interstate commerce?

2. Should some CMV drivers, for example, drivers of passenger-carrying vehicles or of vehicles carrying hazardous materials, be more restricted than other CMV drivers?

3. Some motor vehicle design guidelines suggest limiting the time that a visual or a visual-manual task takes the driver’s eyes off of the forward roadway when designing vehicle controls. Should the Agency define a time limit for CMV drivers’ interaction with mobile telephones (either hand-held, hands-free, or both)?

4. Should the Agency propose limiting the number of keystrokes or button pushes that a CMV driver is allowed within a certain time frame when using a mobile telephone (either hand-held, hands-free, or both)? Should dialing be defined as a specific number of keystrokes or button pushes such as at least seven keystrokes or button pushes?

5. Are there technologies available or soon to be available that would allow completely hands-free mobile telephone operation by CMV drivers? Please provide any information on the availability and costs of such technologies. The Agency also requests comments regarding the amount of time and steps that are required by the driver to initiate and then conduct a hands-free mobile telephone conversation with such devices.

6. The Agency has proposed a definition for “use of a hand-held mobile telephone” in the regulatory text. The Agency requests comments on this definition as well as the public’s views on whether to include a description of allowable alternatives to “use of a hand-held mobile telephone,” such as hands-free technologies.

7. FMCSA seeks comment on its assumptions on States’ costs, any increase in enforcement costs to the States, or any other costs or increases borne by the States.

V. Regulatory Analyses

FMCSA proposes to restrict the use of hand-held mobile telephones by drivers of CMVs while operating in interstate commerce.⁴⁰ The Agency proposes new

⁴⁰ In popular usage, mobile telephones are often referred to as “cell phones.” As explained in the NPRM, however, a variety of different technologies

driver disqualification sanctions for interstate drivers of CMVs who fail to comply with this Federal restriction and new driver disqualification sanctions for CDL holders who have multiple convictions for violating a State or local law or ordinance on motor vehicle traffic control that restricts the use of hand-held mobile telephones. Additionally, motor carriers operating CMVs would be prohibited from requiring or allowing drivers of CMVs to engage in the use of a hand-held mobile telephone while operating in interstate commerce. This rulemaking would improve health and safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of CMVs. In addition, the proposed rulemaking would reduce the financial and environmental burden associated with these crashes and promote the efficient movement of traffic and commerce on the Nation's highways.

Distraction-related crashes impose a substantial cost on society. Two studies estimate that mobile telephone related

crashes are responsible for \$43 billion in costs each year in the United States.⁴¹ Other studies, including two commissioned by the FMCSA, show that research findings are inconsistent regarding the risks associated with talking. But reaching for and dialing the device while driving is a risky activity.⁴² In the regulatory evaluation (in the docket for this proposed rule), FMCSA estimates the benefits and costs of implementing a restriction on the use of hand-held mobile telephones while driving a CMV.

The Agency considered four regulatory options: (1) No action, (2) a restriction on the use of all mobile telephones while operating a CMV for all interstate CMV drivers, (3) a restriction on the use of all mobile telephones while operating a passenger-carrying CMV for all interstate drivers, and (4) a restriction on the use of hand-held mobile telephones by all interstate CMV drivers, which is the preferred option in this proposed rule. The first option serves as a baseline for this analysis. For the second option, the Agency conducted a cost-benefit

analysis and estimates that this option would potentially lead to an annual net benefit of \$4 million (Table 2(b)).

Because specific data that would allow the Agency to quantify benefits are unavailable, for the third and fourth options the Agency conducted threshold analyses. Analysis predicts that the third option would lead to an estimated annual cost of approximately \$6.4 million. Current guidance from DOT's Office of the Secretary places the value of a statistical life at \$6.0 million (Table 2(c)). Consequently, this option would have to eliminate any combination of crash types equivalent in cost to approximately one fatality in order for the benefits of this proposed rule to equal the costs. The analysis further predicts that the preferred fourth option would lead to an estimated 1-year cost of \$12.1 million (Table 2(a)). Consequently, this option would have to eliminate any combination of crash types equivalent to two fatalities per year in order for the benefits of this proposed rule to equal the costs. These results are summarized below in Table 2.

TABLE 2(A)—THRESHOLD ANALYSIS RESULTS—OPTION FOUR (PREFERRED OPTION)

	Total estimated annual costs *	Annual break-even number of fatalities prevented **
Option Four—Restriction on Use of Hand-Held Mobile Telephones—All CMV Drivers.	\$12.1 Million ***	Approximately 2 Fatalities.

TABLE 2(B)—COST-BENEFIT ANALYSIS RESULTS—OPTION TWO (RESTRICTION ON USE OF ALL MOBILE TELEPHONES—ALL CMV DRIVERS)

Estimated annual benefit	Estimated annual cost	Estimated annual net benefit
\$84 Million	\$80 Million	\$4 Million.

TABLE 2(C)—THRESHOLD ANALYSIS RESULTS—OPTION THREE

	Total estimated annual costs *	Annual break-even number of fatalities prevented **
Option Three—Restriction on Use of All Mobile Telephones—All Passenger-Carrying CMV Drivers.	\$6.4 Million	Approximately 1 Fatality.

* This cost estimate does not include a one-time cost to the States of \$2.2 million.

** A statistical life is valued at \$6 million.

*** This is a worst case annual cost as it would apply only if 100% of CMV drivers were theoretically replaced every year.

Because FMCSA is addressing two of the risky activities cited in the VTTI study, the Agency expects the proposed

rule would prevent more than two fatalities and that the benefits justify the cost.

The regulatory evaluation also finds the potential costs to the States and private entities do not require further

are licensed by the Federal Communications Commission (FCC) (47 CFR 20.3) to provide mobile telephone services; thus, these proposed rules would apply to the range of technologies used to provide wireless telephone communications. But some of the materials and research studies discussed in this evaluation use the popular term "cell phone," and the discussion continues that usage in such cases.

⁴¹ Cohen, J.T. and Graham, J.D., A revised economic analysis of restrictions on the use of cell phones while driving, *Risk Analysis* 23(1) 1–14, 2003.

⁴² Olson, R. L., Hanowski, R.J., Hickman, J.S., & Bocanegra, J. (2009) Driver distraction in commercial vehicle operations. (Document No. FMCSA–RRR–09–042) Washington, DC: Federal Motor Carrier Safety Administration, July 2009.

Retrieved October 20, 2009, from <http://www.fmcsa.dot.gov/facts-research/art-public-reports.aspx?> Hickman, J., Hanowski, R. & Bocanegra, J. (2010). Distraction in Commercial Trucks and Buses: Assessing Prevalence and Risk in Conjunction with Crashes and Near-Crashes. Washington, DC: Federal Motor Carrier Safety Administration.

analysis pursuant to the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) because they are less than \$140.8 million per year. I also certify, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that the proposed rule will not have a significant economic impact on a substantial number of small entities because the average cost to carriers subject to the preferred option would be approximately \$24.50.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FMCSA has determined that this rulemaking action is a significant regulatory action under Executive Order 12866, Regulatory Planning and Review, and that it is significant under DOT regulatory policies and procedures because of the substantial Congressional and public interest concerning the crash risks associated with distracted driving. However, the estimated economic costs of the preferred option of the proposed rule do not exceed the \$100 million annual threshold.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term “small entities” comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses.

Carriers are not required to report revenue to the Agency, but are required to provide the Agency with the number of power units (PU) they operate, when they register with the Agency, and to update this figure biennially. Because FMCSA does not have direct revenue figures, PUs serve as a proxy to determine the carrier size that would qualify as a small business given the SBA’s revenue threshold. In order to produce this estimate, it is necessary to determine the average revenue generated by a PU.

With regard to truck PUs, the Agency determined in the 2003 Hours of Service Rulemaking RIA⁴³ that a PU produces

about \$172,000 in revenue annually (adjusted for inflation).⁴⁴ According to the SBA, motor carriers with annual revenue of \$25.5 million are considered small businesses.⁴⁵ This equates to 148 PUs (25,500,000/172,000). Thus, FMCSA considers motor carriers of property with 148 PUs or fewer to be small businesses for purposes of this analysis. The Agency then looked at the number and percentage of property carriers with recent activity that would fall under that definition (of having 148 PUs or fewer). The results show that at least 99 percent of all interstate property carriers with recent activity have 148 PUs or fewer.⁴⁶ This amounts to 481,788 carriers. Therefore, the overwhelming majority of interstate carriers of property would be considered small entities.

With regard to passenger carriers, the Agency conducted a preliminary analysis to estimate the average number of PUs for a small entity earning \$7 million annually, based on an assumption that a passenger-carrying PU generates annual revenues of \$150,000. This estimate compares reasonably to the estimated average annual revenue per PU for the trucking industry (\$172,000). The Agency used a lower estimate because passenger carriers generally do not accumulate as many VMT per PU as carriers of property;⁴⁷ and it is assumed, therefore, that they would generate less revenue on average. The analysis concluded that passenger carriers with 47 PUs or fewer (\$7,000,000 divided by \$150,000/PU = 46.7 PU) would be considered small entities. The Agency then looked at the number and percentage of passenger carriers registered with FMCSA that would fall under that definition (of having 47 PUs or fewer). The results show that at least 96 percent of all interstate passenger carriers with recent activity have 47 PUs or fewer.⁴⁸ This amounts to 11,338 carriers. Therefore, the overwhelming majority of interstate passenger carriers would be considered small entities.

In order to estimate the economic impact of the proposed rule on small entities, FMCSA computed a total

Operations.” Final Rule (68 FR 22456, April 23, 2003).

⁴⁴ The 2000 TTS Blue Book of Trucking Companies, number adjusted to 2008 dollars for inflation.

⁴⁵ U.S. Small Business Administration Table of Small Business Size Standards matched to North American Industry Classification (NAIC) System codes, effective August 22, 2008. See NAIC subsector 484, Truck Transportation.

⁴⁶ MCMIS, as of June 17, 2010.

⁴⁷ FMCSA Large Truck and Bus Crash Facts 2008, Tables 1 and 20; <http://fmcsa.dot.gov/facts-research/LTBCF2008/Index-2008>.

⁴⁸ MCMIS, as of June 17, 2010.

annual cost per carrier for each industry segment. First, FMCSA allocated the total cost⁴⁹ of the proposed rule in the first year among property and passenger carriers according to their respective shares of total carrier population.⁵⁰ Interstate property carriers constitute 98 percent of the total of interstate carriers, whereas interstate passenger carriers constitute 2 percent. The total annual cost of the proposed rule’s preferred option (\$12,095,948)⁵¹ was thus weighted by 98 percent for property carriers leading to a total cost of \$11,854,036, and by 2 percent for passenger carriers, leading to a total cost of \$241,919. Next, FMCSA divided the two weighted costs by their respective number of small carriers, as described above, arriving at a cost-per-carrier for each segment: \$11,854,029/481,788 = \$24.60 for property carriers; and \$241,919/11,338 = \$21.33 for passenger carriers, for a weighted average of \$24.50 per small entity.

While the preferred option of this proposed rule would clearly impact a substantial number of small entities, the Agency does not consider a weighted average cost of approximately \$24.50 per entity per year to be economically significant in light of the estimated average annual revenue of \$172,000.^{52 53} Accordingly, I certify that a regulatory flexibility analysis is not necessary.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FMCSA wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the FMCSA personnel listed in the **FOR FURTHER INFORMATION CONTACT** section of the proposed rule. FMCSA will not retaliate against small entities that question or complain about

⁴⁹ The total cost in this section does not include costs to the States.

⁵⁰ The actual cost burden may not necessarily be proportionate to the carrier segment’s share in the industry. Absent information on this distribution, FMCSA applied the above assumption.

⁵¹ Excluding costs to the States.

⁵² Regulatory Analysis for: Hours of Service of Drivers; Driver Rest and Sleep for Safe Operations, Final Rule—Federal Motor Carrier Safety Administration. 68 FR 22456—Published April 23, 2003.

⁵³ The 2000 TTS Blue Book of Trucking Companies, number adjusted to 2008 dollars for inflation.

⁴³ FMCSA Regulatory Analysis, “Hours of Service of Drivers; Driver Rest and Sleep for Safe

this proposed rule or any policy or action of the Agency.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247).

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$140.8 million (which is the value of \$100 million in 2009 after adjusting for inflation) or more in any 1 year. Though this proposed rule would not result in such expenditure, FMCSA discusses the effects of this rule elsewhere in this preamble.

Paperwork Reduction Act

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

Privacy Impact Assessment

FMCSA conducted a Privacy Threshold Analysis for the proposed rule on restricting the use of hand-held mobile telephones by drivers of passenger-carrying CMVs and determined that it is not a privacy-sensitive rulemaking because the rule would not require any collection, maintenance, or dissemination of Personally Identifiable Information from or about members of the public.

Executive Order 13132 (Federalism)

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments, on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government.

FMCSA recognizes that, as a practical matter, this proposed rule may have some impact on the States. Accordingly, the Agency sought advice from the National Governors Association (NGA), National Conference of State

Legislatures (NCSL), and the American Association of Motor Vehicle Administrators (AAMVA) on the topic of mobile telephone use, by letters to each organization, dated April 6, 2010. (Copies of these letters are available in the docket for this rulemaking.) FMCSA offered NGA, NCSL, and AAMVA officials the opportunity to meet and discuss issues of concern to the States. As a result of these consultation efforts with State and local governments, they would also be able to raise Federalism issues during the comment period for this NPRM. For a further discussion, see the previous section in this NPRM entitled "Impact on other State Laws—Preemption."

Executive Order 12630 (Taking of Private Property)

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13045 (Protection of Children)

FMCSA analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This proposed rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

Executive Order 13211 (Energy Supply, Distribution, or Use)

FMCSA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. FMCSA preliminarily determined that it is not a "significant energy action" under that order. Though it is nonetheless a potentially "significant regulatory action" under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), has not designated it as a

significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

The Agency is not aware of any technical standards used to address mobile telephone use and therefore did not consider any such standards.

National Environmental Policy Act

The Agency analyzed this NPRM for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), determined under our environmental procedures Order 5610.1, published March 1, 2004, in the **Federal Register** (69 FR 9680), and preliminarily assessed that this proposed action requires an Environmental Assessment (EA) to determine if a more extensive Environmental Impact Statement (EIS) is required. In the event that FMCSA finds the environmental impacts do not warrant an EIS, FMCSA will issue a Finding of No Significant Impact (FONSI). The findings in the draft EA indicate there are no *significant* positive or negative impacts to the environment expected from the various options in the proposed rule. There could be minor impacts on emissions, hazardous materials spills, solid waste, socioeconomic, and public health and safety. FMCSA requests comments on the draft EA.

FMCSA also analyzed this proposed rule under the Clean Air Act, as amended (CAA), section 176(c), (42 U.S.C. 7401 *et seq.*) and implementing regulations promulgated by the Environmental Protection Agency. Approval of this proposed action is exempt from the CAA's general conformity requirement since it would not result in any potential increase in emissions that are above the general conformity rule's *de minimis* emission threshold levels (40 CFR 93.153(c)(2)). Moreover, based on our analysis, it is reasonably foreseeable that the proposed

rule would not significantly increase total CMV mileage, nor would it significantly change the routing of CMVs, how CMVs operate, or the CMV fleet-mix of motor carriers. The proposed action merely would establish requirements to restrict hand-held mobile telephone use while driving CMVs.

FMCSA seeks comment on these preliminary determinations.

List of Subjects

49 CFR Part 383

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 384

Administrative practice and procedure, Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

49 CFR Part 390

Highway safety, Intermodal transportation, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

49 CFR Part 391

Alcohol abuse, Drug abuse, Drug testing, Highway safety, Motor carriers, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 392

Alcohol abuse, Drug abuse, Highway safety, Motor carriers.

For the reasons discussed in the preamble, FMCSA proposes to amend 49 CFR parts 383, 384, 390, 391, and 392 as follows:

PART 383—COMMERCIAL DRIVER'S LICENSE STANDARDS; REQUIREMENTS AND PENALTIES

1. The authority citation for part 383 continues to read as follows:

Authority: 49 U.S.C. 521, 31136, 31301 *et seq.*, and 31502; secs. 214 and 215 of Pub. L. 106–159, 113 Stat. 1766, 1767; sec. 1012(b) of Pub. L. 107–56; 115 Stat. 397; sec. 4140 of Pub. L. 109–59, 119 Stat. 1144, 1726; and 49 CFR 1.73.

2. Amend § 383.5 by adding the definitions “mobile telephone” and “using a hand-held mobile telephone” in alphabetical order and revising the definition of “texting” to read as follows:

§ 383.5 Definitions.

* * * * *

Mobile telephone means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include two-way or Citizens Band Radio services.

* * * * *

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

(i) Inputting, selecting, or reading information on a global positioning system or navigation system; or

(ii) Using a device capable of performing multiple functions (*e.g.*, fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

* * * * *

Using a hand-held mobile telephone means using at least one hand to hold a mobile telephone to conduct a voice communication or to reach for or dial a mobile telephone.

* * * * *

3. Amend § 383.51 by adding a new paragraph (c)(10) to Table 2 to read as follows:

§ 383.51 Disqualifications of drivers.

* * * * *

(c)* * *

TABLE 2 TO § 383.51

If the driver operates a motor vehicle and is convicted of:	For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . .				For a second conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . .				For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a CMV, a person required to have a CDL and a CDL holder must be disqualified from operating a CMV for . . .				For a third or subsequent conviction of any combination of offenses in this Table in a separate incident within a 3-year period while operating a non-CMV, a CDL holder must be disqualified from operating a CMV, if the conviction results in the revocation, cancellation, or suspension of the CDL holder's license or non-CMV driving privileges, for . . .			
	60 days				Not applicable				120 days				Not applicable.			
(10) Violating a State or local law or ordinance on motor vehicle traffic control restricting or prohibiting the use of a hand-held mobile telephone while driving a CMV. ²	60 days				Not applicable				120 days				Not applicable.			

²Driving, for the purpose of this disqualification, means operating a commercial motor vehicle, with the motor running, including while temporarily stationary because of traffic, a traffic control device,

or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver has moved the vehicle to the side of, or off, a highway,

as defined in 49 CFR 390.5, and has halted in a location where the vehicle can safely remain stationary.

* * * * *

PART 384—STATE COMPLIANCE WITH COMMERCIAL DRIVER'S LICENSE PROGRAM

4. The authority citation for part 384 continues to read as follows:

Authority: 49 U.S.C. 31136, 31301 *et seq.*, and 31502; secs. 103 and 215 of Pub. L. 106–159, 113 Stat. 1753, 1767; and 49 CFR 1.73.

5. Amend § 384.301 by adding a new paragraph (f) to read as follows:

§ 384.301 Substantial compliance—general requirements.

* * * * *

(f) A State must come into substantial compliance with the requirements of subpart B of this part in effect as of [INSERT EFFECTIVE DATE] as soon as practical, but not later than [INSERT DATE 3 YEARS AFTER THE EFFECTIVE DATE].

PART 390—FEDERAL MOTOR CARRIER SAFETY REGULATIONS; GENERAL

6. The authority citation for part 390 continues to read as follows:

Authority: 49 U.S.C. 508, 13301, 13902, 31133, 31136, 31144, 31151, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 114, Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 217, 229, Pub. L. 106–159, 113 Stat. 1748, 1767, 1773; and 49 CFR 1.73.

7. Amend § 390.3 by revising paragraphs (f)(1) and (f)(6) to read as follows: § 390.3 General applicability.

* * * * *

(f) * * *

(1) All school bus operations as defined in § 390.5, except for the provisions of §§ 391.15(f), 392.80 and 392.82 of this chapter.

* * * * *

(6) The operation of commercial motor vehicles designed or used to transport between 9 and 15 passengers (including the driver), not for direct compensation, provided the vehicle does not otherwise meet the definition of a commercial motor vehicle, except that motor carriers and drivers operating such vehicles are required to comply with §§ 390.15, 390.19, 390.21(a) and (b)(2), 391.15(f), 392.80 and 392.82.

* * * * *

8. Amend § 390.5 by adding the definitions "mobile telephone" and "using a hand-held mobile telephone" in alphabetical order and revising the definition of "texting" to read as follows:.

§ 390.5 Definitions.

* * * * *

Mobile telephone means a mobile communication device that falls under or uses any commercial mobile radio service, as defined in regulations of the Federal Communications Commission, 47 CFR 20.3. It does not include two-way or Citizens Band Radio services.

* * * * *

Texting means manually entering alphanumeric text into, or reading text from, an electronic device.

(1) This action includes, but is not limited to, short message service, e-mailing, instant messaging, a command or request to access a World Wide Web page, or engaging in any other form of electronic text retrieval or entry, for present or future communication.

(2) Texting does not include:

(i) Inputting, selecting, or reading information on a global positioning system or navigation system; or

(ii) Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.

* * * * *

Using a hand-held mobile telephone means using at least one hand to hold a mobile telephone to conduct a voice communication or to reach for or dial a mobile telephone.

PART 391—QUALIFICATION OF DRIVERS AND LONGER COMBINATION VEHICLE (LCV) DRIVER INSTRUCTIONS

9. The authority citation for part 391 continues to read as follows:

Authority: 49 U.S.C. 322, 504, 508, 31133, 31136, and 31502; sec. 4007(b) of Pub. L. 102–240, 105 Stat. 2152; sec. 114 of Pub. L. 103–311, 108 Stat. 1673, 1677; sec. 215 of Pub. L. 106–159, 113 Stat. 1767; and 49 CFR 1.73.

10. Revise § 391.2 to read as follows:

§ 391.2 General exceptions.

(a) *Farm custom operation.* The rules in this part, except for § 391.15 (e) and (f), do not apply to a driver who drives a commercial motor vehicle controlled and operated by a person engaged in custom-harvesting operations, if the commercial motor vehicle is used to—

(1) Transport farm machinery, supplies, or both, to or from a farm for custom-harvesting operations on a farm; or

(2) Transport custom-harvested crops to storage or market.

(b) *Apiarian industries.* The rules in this part, except for § 391.15 (e) and (f), do not apply to a driver who is operating a commercial motor vehicle

controlled and operated by a beekeeper engaged in the seasonal transportation of bees.

(c) *Certain farm vehicle drivers.* The rules in this part, except for § 391.15 (e) and (f), do not apply to a farm vehicle driver except a farm vehicle driver who drives an articulated (combination) commercial motor vehicle, as defined in § 390.5. For limited exemptions for farm vehicle drivers of articulated commercial motor vehicles, see § 391.67.

11. Amend § 391.15 by adding a new paragraph (f) to read as follows:

§ 391.15 Disqualification of drivers.

* * * * *

(f) Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle—

(1) *General rule.* A driver who is convicted of violating the restriction on using a hand-held mobile telephone in § 392.82(a) of this chapter is disqualified from driving a commercial motor vehicle for the period of time specified in paragraph (f)(2) of this section.

(2) *Duration.* Disqualification for violation of a restriction on using a hand-held mobile telephone while driving a commercial motor vehicle—

(i) *Second violation.* A driver is disqualified for 60 days if the driver is convicted of two violations of § 392.82(a) of this chapter in separate incidents committed during any 3-year period.

(ii) *Third or subsequent violation.* A driver is disqualified for 120 days if the driver is convicted of three or more violations of § 392.82(a) of this chapter in separate incidents committed during any 3-year period.

PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

12. The authority citation for part 392 continues to read as follows:

Authority: 49 U.S.C. 13902, 31136, 31151, 31502; and 49 CFR 1.73.

13. Add a new § 392.82 to subpart H to read as follows:

§ 392.82 Restriction on using a hand-held mobile telephone.

(a) *Restriction.* (1) *Drivers.* No driver shall use a hand-held mobile telephone while driving a CMV.

(2) *Motor Carriers.* No motor carrier shall allow or require its drivers to use a hand-held mobile telephone while driving a CMV.

(b) *Definitions.* For the purpose of this section only, *driving* means operating a commercial motor vehicle, with the motor running, including while

temporarily stationary because of traffic, a traffic control device, or other momentary delays. Driving does not include operating a commercial motor vehicle with or without the motor running when the driver has moved the vehicle to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary.

(c) *Exceptions.* (1) *School bus operations and vehicles designed or used to transport 9 to 15 passengers, including the driver, not for direct compensation.* The provisions of § 390.3(f)(1) and (6) of this chapter are not applicable to this section.

(2) *Emergencies.* Using a hand-held mobile telephone is permissible by

drivers of a CMV when necessary to communicate with law enforcement officials or other emergency services.

Issued on: December 13, 2010.

Anne S. Ferro,
Administrator.

[FR Doc. 2010-31736 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-EX-P

Notices

Federal Register

Vol. 75, No. 244

Tuesday, December 21, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Privacy Act of 1974: Notice of Proposed Privacy Act System of Records Revision and Proposed New Routine Uses

AGENCY: Grain Inspection, Packers and Stockyards Administration, U.S. Department of Agriculture.

ACTION: Notice of proposed Privacy Act system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the U.S. Department of Agriculture (USDA), Grain Inspection, Packers and Stockyards Administration (GIPSA), is giving notice that it is revising a system of records that is maintained for the purpose of enforcing the U.S. Grain Standards Act (USGSA) and certain provisions of the Agricultural Marketing Act of 1946 (AMA). GIPSA's Federal Grain Inspection Service (FGIS) administers the USGSA and certain provisions of the AMA.

DATES: *Effective Date:* This notice will be effective without further notice on February 22, 2011 unless modified by a subsequent notice to incorporate comments received from the public. Written or electronic comments must be received by the contact person listed below on or before January 20, 2011 to be assured consideration.

ADDRESSES: You may submit written or electronic comments on this notice by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *E-mail:* comments.gipsa@usda.gov.
- *Fax:* (202) 690-2173.
- *Mail:* Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1633-S, Washington, DC 20250-3642.
- *Hand Delivery or Courier:* Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1633-S, Washington, DC 20250-3642.

Instructions: All comments will become a matter of public record and should be identified as "GIPSA FGISonline System of Records Comments," making reference to the date and page number of this issue of the **Federal Register**. Comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)). Please call GIPSA Management and Budget Services at (202) 720-7486 to make an appointment to read comments.

FOR FURTHER INFORMATION CONTACT: Randall Jones, Deputy Administrator, Federal Grain Inspection Service, at (202) 720-9170.

SUPPLEMENTARY INFORMATION: The USGSA, enacted in 1916, authorizes the Secretary of Agriculture to establish official U.S. standards for grain and a national grain inspection system. The USGSA has been amended many times, but the most significant amendment occurred in 1976 when FGIS was created to manage the national grain inspection system and to establish a national grain weighing program. In October 1994, FGIS was merged with another USDA agency, the Packers and Stockyards Administration, to create GIPSA.

The USGSA requires, among other provisions, that shipments of grain of a specified grade for export be inspected and weighed at the export terminal and that either FGIS perform and certify such inspections or that FGIS delegate its authority to State government agencies to perform the services under FGIS' supervision. The USGSA authorizes FGIS to designate private and State agencies to offer and perform official inspections in the domestic market, to license delegated and designated agency personnel to conduct official inspections, and to monitor the State-operated and privately owned official agencies throughout the inspection process. Also, the USGSA requires that all persons who buy, handle, weigh, or transport more than 15,000 metric tons of U.S. grain for sale in foreign commerce grain business register with FGIS. Those who engage in practices prohibited by the USGSA or who are convicted of any violation involving the handling, weighing, or inspection of grain may be refused official inspection and weighing services; may have their designation of an official agency revoked; their license

suspended, revoked, or not renewed; or their certificate of registration suspended. Criminal and/or civil penalties may be assessed to any person who commits an offense prohibited by the USGSA. Sections 7 U.S.C. 77, 79, 79a, 84, 87f-1 of the USGSA and sections 800.15-18, 800.30-39, 800.170-180, 800.215-219, and 800.217 of the USGSA regulations establish the requirements and procedures for obtaining official services, for designating agencies and licensing individuals, for supervising and monitoring activities, and for registering an entity to be involved in foreign commerce grain business.

Under the AMA, FGIS administers and enforces certain inspection and standardization activities related to rice, pulses, lentils, and processed grain products such as flour and corn meal, as well as other agricultural commodities. Services under the AMA are performed upon request on a fee basis for both domestic and export shipments by either FGIS employees or individual contractors, or through cooperative agreements with States and private entities. Section 7 U.S.C. 1621 *et seq.* of the AMA and sections 868.20-.26, 868.30-.36, 868.80-.84 of the AMA regulations establish the requirements and procedures for obtaining official services and for licensing persons to inspect commodities and to perform related services.

The information that is collected by FGIS will be maintained in the FGISonline system of records and used to administer and enforce the provisions of the USGSA, as well as applicable provisions of the AMA and regulations. In accordance with the Office of Management and Budget regulations (5 CFR part 1320) that implement the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collected and maintained by the FGISonline system of records was approved on April 14, 2008, and will expire on April 30, 2011.

Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a), USDA announces that it is revising an existing system of records "USDA/FGIS-1: Employment History Records for Licensed Nonfederal Employees." The revisions will: (1) Change the name of the system to "USDA/GIPSA-2, GIPSA FGISonline"; (2) update the system location and system manager's name; (3) add new

categories of individuals covered by the system; (4) add new categories of records in the system; (5) add routine uses; and (6) revise the policies and practices for storing, retrieving, accessing, retaining, safeguarding, and disposing of records in the system. These changes are necessary to address administrative changes and an agency restructuring; to address the current needs of the agency; to define more completely the data and information located in the system; and to update new reporting requirements.

GIPSA is modernizing the business functions of its grain program through the development of *FGISonline*, which is a portfolio of online business applications that will change the way that GIPSA does business and that will bring official grain inspection and weighing to the desktop. GIPSA believes *FGISonline* will improve internal program efficiencies and effectiveness, will better serve the customers of the official inspection and weighing service, and will meet Federal eGovernment and related USDA requirements.

FGISonline will capture all grain inspection, testing, and weighing information at the point of origin and store and manage data and information collected and generated under the USGSA and AMA to deliver official services, to monitor programs, to support queries, and to provide reporting capabilities. It will manage inspection and weighing records for services performed under the USGSA and AMA and will provide the public access to general information about grain quality, official service volume, and the inspection and weighing of grain in domestic and international commerce. *FGISonline* will automate the licensing, registration, delegation/designation, and equipment testing processes; provide online testing for licensed personnel and enhance recordkeeping; and expand FGIS' quality assurance and control capabilities.

Information relating to FGIS' official service providers, individuals licensed under the USGSA to perform official services, and registrants engaged in foreign commerce grain business will be maintained in the Licensing; Delegation, Designation, and Export Registration; and Quality Assurance/Quality Control *FGISonline* programs. Information that will be collected and maintained includes individuals' names, trade names, character of organizations, mailing and/or operating addresses, ownership information, names and locations where business is conducted, telephone numbers, employing official agencies, birth months and years,

license numbers, and signatures of licensees.

When *FGISonline* is completed, GIPSA's customers will have online access to the information and applications they need to request grain inspection services; receive reports on service status; view the status of their user-fee accounts; and receive final certified results online which, in turn, will allow customers to integrate official inspection data into their own information and document management systems. Official service providers who are interested in providing official inspection services will also be able to apply for GIPSA designation and re-designation online. Once officially designated, these providers will have direct access through the Internet to GIPSA's extensive quality assurance program to ensure that their inspection results align with the official standards that are maintained by GIPSA. This modernization effort will create synergy across GIPSA programs and data sources, allowing GIPSA to improve internal program efficiencies and effectiveness.

A "Report on an Updated System," required by 5 U.S.C. 552a(r) as implemented by the Office of Management and Budget (OMB) Circular A-130, was sent to the Chairman, Committee on Homeland Security and Governmental Affairs, United States Senate; the Chairman, Committee on Oversight and Government Reform, House of Representatives; and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

Dated: December 14, 2010.

Thomas J. Vilsack,
Secretary.

USDA/GIPSA-2

SYSTEM NAME:

GIPSA *FGISonline*.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

This system of records is under the control of the Deputy Administrator, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system of records include persons who are licensed under the USGSA and/or AMA to perform official grain inspection and

weighing services, persons who are registered under the USGSA to engage in foreign commerce grain business, and persons who operate private businesses that have been designated to provide official services.

CATEGORIES OF RECORDS IN THE SYSTEM:

The different categories of records in this system include applications for license, registration, and designation; official inspection, testing, and weighing data for grain, rice, pulses, graded commodities, and processed commodities; equipment data; and customer information. Information collected includes names of individuals applying for a license, home addresses, birth months and years, license numbers, signatures of licensees, employing official agencies' names and addresses, and licensees' examinations and score sheets; registrants' names, trade name, character of organizations, mailing and/or operating addresses, ownership information, names and locations where business is conducted, and telephone numbers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

7 U.S.C. 77, 79, 79a, 79b, 84, 87f-1; and 7 U.S.C. 1622.

AGENCY OFFICIAL RESPONSIBLE FOR THE SYSTEM OF RECORDS:

Deputy Administrator, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250.

PURPOSE(S):

FGISonline will give GIPSA's customers online access to the information and applications they need to request grain inspection services; receive reports on service status; see the status of their user-fee account; and receive final certified results online, which, in turn, will allow customers to integrate official inspection data into their own information management systems. Private and State inspection agencies interested in being authorized to provide official inspection services will also be able to apply for GIPSA designation and re-designation online. Once officially designated, these agencies will have direct access through the Internet to GIPSA's extensive quality assurance program to ensure that their inspection results align with the official standards maintained by GIPSA.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

The information collected and maintained in the *FGISonline* system of records is used to administer and to enforce the provisions under the

USGSA and AMA. Such provisions include the mandatory inspection and weighing of export grain; the registration of entities involved in foreign commerce grain business; the licensing of individuals who perform official services; the delegation and designation of official service providers; and providing certain inspection and standardization activities related to rice, pulses, lentils, and processed grain products such as flour and corn meal, as well as other agricultural commodities.

Records in this system may be disclosed as follows to:

1. The Department of Justice when the agency or any component thereof; any employee of the agency in his or her official capacity where the Department of Justice has agreed to represent the employee; or the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

2. A court or adjudicative body in a proceeding when the agency or any component thereof, any employee of the agency in his or her official capacity; any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or the United States Government is a party to litigation or has an interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

3. When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative, or prosecutorial responsibility of the receiving entity.

4. A Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

5. The National Archives and Records Administration or to the General Services Administration for records management inspections conducted pursuant to 44 U.S.C. 2904 and 2906.

6. Appropriate agencies, entities, and persons when: (a) GIPSA suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) USDA has determined that as a result of the suspected or confirmed compromise, there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by USDA or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with USDA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICE FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM STORAGE:

Electronic records are maintained on a file server. Paper files and electronic media are maintained in physically secured rooms at USDA.

RETRIEVABILITY:

Records can be accessed by customer name, applicant name, business entity name, licensee name, license number.

SAFEGUARDS:

Only authorized USDA personnel will have access to the records in the system. Permission level assignments allow users access only to those functions for which they are authorized. Users are granted system access upon successful completion of security training, and each user is provided with a unique and strong user-identification. Electronic records are controlled through Federal, USDA, and GIPSA security requirements; they are password protected; and access is limited to those who have an official need to know. Paper records are maintained in locked cabinets and in desks that are located in physically secured rooms.

RETENTION AND DISPOSAL:

The retention of data in the system is in accordance with applicable USDA Records Disposition Schedules, as approved by the National Archives and Records Administration. Hard copy records are maintained by varying periods of time, and temporary records are disposed of by shredding when the retention period is complete.

SYSTEM MANAGER AND ADDRESS:

Deputy Administrator, Federal Grain Inspection Service, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250.

NOTIFICATION PROCEDURES:

Individuals may request information regarding this system of records and/or information on whether the system contains records pertaining to them from the system manager identified above. Any individual requesting such information must provide his or her name and address.

RECORD ACCESS PROCEDURE:

Any individual may obtain information from a record in the system which pertains to him/her by submitting a written request to the Privacy Act Officer, Management and Budget Services, USDA-GIPSA, 1400 Independence Avenue, SW., STOP 3642, Washington, DC 20250. The envelope and letter should be marked "Privacy Act Request" and should include the name, address, and any other particulars of the individual for which the request is made.

CONTESTING RECORD PROCEDURES:

Individuals desiring to contest or amend information maintained in the system should direct their requests to the system manager listed above, state the reason(s) for contesting the information, and provide all available documentation to support the requested action.

RECORD SOURCE CATEGORIES:

Information in this system is provided by GIPSA employees at service locations to their customers; official service providers; applicants requesting export registration, applicants requesting that they be designated to become an official service provider, and applicants requesting that they be licensed to perform official services under the USGSA. Personal information in this system is obtained from the owners and officers who operate as official service providers and from individuals who are licensed under the USGSA to perform official services. The information is provided on applications for

registration, for designation, and for license.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010-31939 Filed 12-20-10; 8:45 am]

BILLING CODE 3410-KD-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS-PY-10-0098]

Poultry Programs; Notice of Request for an Extension and Revision of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-20), this notice announces the intention of the Agricultural Marketing Service (AMS) to request an extension for and revision to a currently approved information collection in support of the Regulations Governing the Voluntary Grading of Shell Eggs.

DATES: Comments received by February 22, 2011 will be considered.

ADDITIONAL INFORMATION OR COMMENTS: Interested persons are invited to submit written comments on the Internet at <http://www.regulations.gov> or to David Bowden, Jr., Chief, Standards, Promotion, & Technology Branch; Poultry Programs, AMS, U.S. Department of Agriculture; 1400 Independence Avenue, SW., Stop 0259; Washington, DC 20250-0259; fax (202) 720-2930. Comments should reference the docket number and the date and page number of this issue of the **Federal Register**. Comments will be available for public inspection at the above address during regular business hours, or can be viewed at: <http://www.regulations.gov>. All comments received will be posted without change, including any personal information provided.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Sara Lutton, Standards, Promotion, & Technology Branch; Poultry Programs, AMS, U.S. Department of Agriculture; 1400 Independence Avenue, SW., Stop 0259; Washington, DC 20250-0259; phone (202) 720-0976; fax (202) 720-2930.

SUPPLEMENTARY INFORMATION:

Title: Regulations Governing the Voluntary Grading of Shell Eggs—7 CFR part 56.

OMB Number: 0581-0128.

Expiration Date, as approved by OMB: July 31, 2011.

Type of Request: Extension and revision of a currently approved information collection.

Abstract: The Agricultural Marketing Act of 1946 (7 U.S.C. 1621-1627) (AMA) directs and authorizes the Department of Agriculture (USDA) to develop standards of quality, grades, grading programs, and services which facilitate trading of agricultural products and assure consumers of quality products that are graded and identified under USDA programs.

To provide programs and services, section 203(h) of the AMA (7 U.S.C. 1622(h)) directs and authorizes the Secretary of Agriculture to inspect, certify, and identify the grade, class, quality, quantity, and condition of agricultural products under such rules and regulations as the Secretary may prescribe, including assessment and collection of fees for the cost of service.

The regulations in 7 CFR part 56 provide a voluntary program for grading shell eggs on the basis of U.S. standards, grades and weight classes. In addition, the shell egg industry and users of the products have requested development and provision of other types of voluntary services under these regulations; e.g., contract and specification acceptance services and certification of quantity. Voluntary grading service is available on a resident basis or on an as-needed basis. The AMA requires Agency costs be assessed and collected from respondents who request voluntary program services. Information provided during the request is used by the Agency to determine cost assessments.

The information collection requirements in this request are essential to carry out the intent of the AMA, to provide the respondents the type of service they request, and to administer the program. The information request requires personal data, such as name, type of business, address and description of service requested.

The information collected is used only by authorized representatives of USDA (AMS, Poultry Programs' national staff; regional directors and their staffs; Federal-State supervisors and their staffs; and resident Federal-State graders, which include State agencies). The information is used to administer and conduct grading services requested by respondents. The Agency is the primary user of the information.

Information is also used by authorized State agencies under a cooperative agreement with AMS.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.227 hours per response.

Respondents: State or local governments, businesses or other for-profits, Federal agencies or employees, small businesses or organizations.

Estimated Number of Respondents: 658.

Estimated Number of Responses: 23,145.50.

Estimated Number of Responses per Respondent: 35.18.

Estimated Total Annual Burden on Respondents: 5,254.20 hours.

Send comments regarding, but not limited to, the following: (a) Whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (b) the accuracy of the Agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; or (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Dated: December 15, 2010.

Robert C. Keeney,

Acting Associate Administrator.

[FR Doc. 2010-31921 Filed 12-20-10; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS-CN-10-0110; CN-10-007]

Tobacco Report: Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget, for an extension of the currently approved information collection for Tobacco Report (OMB No. 0581-0004).

DATES: Comments received by February 22, 2011 will be considered.

ADDITIONAL INFORMATION OR COMMENTS: Interested persons are invited to submit written comments concerning this proposal to Shethir Riva, Chief, Research and Promotion, Cotton and Tobacco Programs, Agricultural Marketing Service, USDA, 1400 Independence Ave., SW., Room 2635-S, Washington, DC 20250-0224. Comments should be submitted in triplicate. Comments may also be submitted electronically through <http://www.regulations.gov>. All comments should reference the docket number and page number of this issue of the **Federal Register**. All comments received will be made available for public inspection at <http://www.regulations.gov> or at the Cotton and Tobacco Programs, AMS, USDA, 1400 Independence Ave., SW., Room 2635-S, Washington, DC 20250 during regular business hours.

FOR FURTHER INFORMATION CONTACT: Shethir Riva, Chief, Research and Promotion, Cotton and Tobacco Programs, Agricultural Marketing Service, USDA, 1400 Independence Ave., SW., Room 2635-S, Washington, DC 20250-0224, telephone (202) 720-3193, facsimile (202) 690-1718, or e-mail at Shethir.riva@ams.usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Tobacco Report.

OMB Number: 0581-0004.

Expiration Date of Approval: 06/30/2011.

Type of Request: Extension of a currently approved information collection.

Abstract: The Tobacco Statistics Act of 1929 (7 U.S.C. 501-508) provides for the collection and publication of statistics of tobacco by USDA with regard to quantity of leaf tobacco in all forms in the United States and Puerto Rico, owned by or in the possession of dealers, manufacturers, and others with the exception of the original growers of the tobacco.

The statistics shall show the quantity of the tobacco in such detail as to types, as USDA shall deem to be practical and necessary and shall be summarized as of January 1, April 1, July 1, and October 1 of each year and are due within 15 days of the summarized dates.

The information furnished under the provisions of this Act shall be used only for statistical purposes for which it is supplied. No publication shall be made by USDA whereby the data furnished by any particular establishment can be identified, nor shall anyone other than the sworn employees of USDA be allowed to examine the individual reports.

The regulations governing the Tobacco Stocks and Standards Act (7 CFR part 30) issued under the Tobacco Statistics Act (7 U.S.C. 501-508) specifically address the reporting requirements. Tobacco in leaf form or stems is reported by types of tobacco and whether stemmed or unstemmed. Tobacco in sheet form shall be segregated as to whether for cigar wrapper, cigar binder, for cigarettes, or for other products.

Tobacco stocks reporting is mandatory. The basic purpose of the information collection is to ascertain the total supply of unmanufactured tobacco available to domestic manufacturers and to calculate the amount consumed in manufactured tobacco products. This data was also used for the calculation of production quotas for individual types of tobacco and for price support calculations until repealed in 2005.

The Quarterly Report of Manufacture and Sales of Snuff, Smoking and Chewing Tobacco is voluntary. Prior to 1965, information on the manufacture and sale of snuff, smoking and chewing tobacco products was available from Treasury Department publications on the collection of taxes. With repeal of the Federal tax in 1965, the industry requested that the collection of basic data be continued to maintain the statistical series and all major manufacturers agreed to furnish information. Federal taxes were re-imposed in 1985 for snuff and chewing tobacco and the Treasury Department began reporting data on these products, but not in the detail desired by the industry. Data from this report was also used in calculations to determine the production quotas of types of tobacco used in these products until repealed in 2005.

The Agricultural Marketing Act of 1946 (7 U.S.C. 1621-1627) directs and authorizes USDA to collect, tabulate and disseminate statistics on marketing agricultural products including market supplies, storage stocks, quantity, quality, and condition of such products in various positions in the marketing channel, utilization of sub-products, shipments, and unloads.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.90 hours per response.

Respondents: Primarily tobacco dealers and manufacturers including small businesses or organizations.

Estimated Number of Respondents: 57.

Estimated Total Annual Responses: 228.

Estimated Number of Responses per Respondent: 4.

Estimated Total Annual Burden on Respondents: 204.

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be submitted electronically through <http://www.regulations.gov>. Comments also may be sent to Shethir Riva, Chief, Research and Promotion, Cotton and Tobacco Programs, Agricultural Marketing Service, USDA, 1400 Independence Ave., SW., Room 2635-S, Washington, DC 20250-0224. All comments received will be available for public inspection during regular business hours at the same address or through <http://www.regulations.gov>.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: December 15, 2010.

Robert C. Keeney,

Acting Associate Administrator.

[FR Doc. 2010-31922 Filed 12-20-10; 8:45 am]

BILLING CODE 3410-02-P

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Notice of Meetings of the Agricultural Policy Advisory Committee for Trade and the Agricultural Technical Advisory Committees for Trade

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice of a closed meeting.

SUMMARY: Notice is hereby given that the Agricultural Policy Advisory Committee for Trade (APAC) and the Agricultural Technical Advisory Committees for Trade (ATAC) will hold closed meetings on January 13, 2011. The advisory committees are administered by USDA and the Office of the United States Trade Representative (USTR). The meetings are closed to the public in accordance with the Trade Act

of 1974, 19 U.S.C. 2155(f)(2), and the Government in the Sunshine Act, 5 U.S.C. 552b(c)(4) and (6). USTR has determined that public access to this meeting would seriously compromise the development by the U.S. Government of trade policy priorities, negotiating objectives, or bargaining positions with respect to the operation of trade agreements and other matters arising in connection with the development, implementation, and administration of the trade policy of the United States. Topics will include Doha Round negotiations in the World Trade Organization (WTO), WTO accession negotiations, and negotiations in bilateral and regional free trade agreements.

DATES: The meetings are scheduled for January 13, 2011, unless otherwise notified.

ADDRESSES: The meetings will be held at the U.S. Department of Agriculture, 1400 Independence Avenue, SW., Washington, DC 20250.

FOR FURTHER INFORMATION CONTACT: Lorie Fitzsimmons by phone at (202) 720-3430 or by e-mail at: lorie.fitzsimmons@fas.usda.gov.

SUPPLEMENTARY INFORMATION: The APAC is authorized by sections 135(c)(1) and (2) of the Trade Act of 1974, as amended (Pub. L. 93-618, 19 U.S.C. 2155). The purpose of the committee is to advise the Secretary of Agriculture and the USTR concerning agricultural trade policy. The committee is intended to ensure that representative elements of the private sector have an opportunity to express their views to the U.S. Government.

The ATACs are comprised of six committees covering the following commodity sectors: Animals and Animal Products; Fruits and Vegetables; Grains, Feed and Oilseeds; Processed Foods; Sweeteners and Sweetener Products; and Tobacco, Cotton, Peanuts and Planting Seeds. Each is authorized by sections 135(c)(1) and (2) of the Trade Act of 1974, as amended (Pub. L. 93-618, 19 U.S.C. 2155). These committees address the technical aspects of issues and provide advice to the benefit of the Secretary of Agriculture and the USTR.

The Committees meet at the call of the Secretary of Agriculture and the USTR through the respective Designated Federal Officers depending on the level of activity in trade agreement negotiations and/or other matters concerning the administration of trade policy, the needs of the Secretary of Agriculture and the USTR, and the

activity of the technical-level committees.

Dated: December 14, 2010.

John D. Brewer,

Administrator, Foreign Agricultural Service.

[FR Doc. 2010-31969 Filed 12-20-10; 8:45 am]

BILLING CODE 3410-10-P

DEPARTMENT OF COMMERCE

International Trade Administration

The Manufacturing Council: Meeting of the Manufacturing Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an Open Meeting.

SUMMARY: The Manufacturing Council will hold a meeting to discuss competitiveness, clean energy, export/import issues and workforce development issues affecting the U.S. manufacturing sector and to receive briefings from the Departments of Commerce, the Treasury, Labor, and Energy on their activities relating to the U.S. manufacturing sector.

DATES: January 12, 2011.

Time: 10-11:30 a.m.

ADDRESSES: Hilton Garden Inn, 6165 Levis Commons Boulevard, Perrysburg, OH 43551. All guests are requested to register in advance. This program will be physically accessible to people with disabilities. Seating is limited and will be on a first come, first served basis. Requests for sign language interpretation, other auxiliary aids, or pre-registration, should be submitted no later than January 5, 2011, to Jennifer Pilat, the Manufacturing Council, Room 4043, 1401 Constitution Avenue, NW., Washington, DC, 20230, telephone 202-482-4501, jennifer.pilat@trade.gov. Last minute requests will be accepted, but may be impossible to fill.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, the Manufacturing Council, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone: 202-482-4501, e-mail: jennifer.pilat@trade.gov.

SUPPLEMENTARY INFORMATION: The Council was re-chartered on April 8, 2010, to advise the Secretary of Commerce on matters relating to the U.S. manufacturing industry.

No time will be available for oral comments from members of the public attending the meeting. Any member of the public may submit pertinent written comments concerning the Council's affairs at any time before or after the meeting. Comments may be submitted

to Jennifer Pilat at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5 p.m. Eastern Time on January 5, 2011, to ensure transmission to the Council prior to the meeting. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of Council meeting minutes will be available within 90 days of the meeting.

Dated: December 15, 2010.

Jennifer Pilat,

Executive Secretary, The Manufacturing Council.

[FR Doc. 2010-31945 Filed 12-20-10; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Travel and Tourism Advisory Board: Meeting of the U.S. Travel and Tourism Advisory Board

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an Open Meeting.

SUMMARY: This notice sets forth the schedule and agenda for an open meeting of the U.S. Travel and Tourism Advisory Board (Board). The agenda may change to accommodate Board business. The final agenda will be posted on the Department of Commerce Web site for the Board at http://tinet.ita.doc.gov/TTAB/TTAB_Home.html.

DATES: February 1, 2011, 8:30 a.m.-11:30 a.m. Eastern Standard time (EST)

ADDRESSES: The meeting will be held at the U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC, Room 4830.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, the U.S. Travel and Tourism Advisory Board, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone: 202-482-4501, e-mail: jennifer.pilat@trade.gov.

SUPPLEMENTARY INFORMATION: *Background:* The Board was re-chartered in September 2009, to advise the Secretary of Commerce on matters relating to the U.S. travel and tourism industries.

Topics to be considered: During the meeting, the Board will hear updates from three Board subcommittees on Advocacy; Marketing, Outreach & Coordination; and Research.

Representatives from the Departments of Homeland Security, State and Transportation will also provide updates on their respective agencies' work relating to the U.S. travel and tourism industries. The Travel Facilitation subcommittee will present its recommendations to the Board.

Public Participation: The meeting will be open to the public and will be physically accessible to people with disabilities. Seating is limited and will be on a first come, first served basis. Because of building security, all non-government attendees must pre-register no later than 5 p.m. EST on January 25, 2011 with Jennifer Pilat, the U.S. Travel and Tourism Advisory Board, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone 202-482-4501, jennifer.pilat@trade.gov. Please specify any requests for sign language interpretation, other auxiliary aids, or other reasonable accommodation no later than 5 p.m. EST on January 25, 2011, to Jennifer Pilat at the contact information above. Last minute requests will be accepted, but may be impossible to fill.

No time will be available for oral comments from members of the public attending the meeting. Any member of the public may submit pertinent written comments concerning the Board's affairs at any time before or after the meeting. Comments may be submitted to Jennifer Pilat at the contact information indicated above. To be considered during the meeting, comments must be received no later than 5 p.m. EST on January 25, 2011, to ensure transmission to the Board prior to the meeting. Comments received after that date will be distributed to the members but may not be considered at the meeting. Copies of Board meeting minutes will be available within 90 days of the meeting.

Dated: December 15, 2010.

Jennifer Pilat,

Executive Secretary, U.S. Travel and Tourism Advisory Board.

[FR Doc. 2010-31924 Filed 12-20-10; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

International Trade Administration

Manufacturing Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of Reopening of the Application Period for Membership on the Manufacturing Council.

SUMMARY: On November 23, 2010, the Department of Commerce's International Trade Administration published a notice in the **Federal Register** (75 FR 71417) soliciting applications to fill one vacant position on the Manufacturing Council (Council). The November 23, 2010 notice provided that all applications must be received by the Office of Advisory Committees of the Department of Commerce by close of business on December 7, 2010. This notice reopens the application period in order to provide the public with an additional opportunity to submit applications. The eligibility and evaluation criteria for selection of a member to fill the vacant position contained in the November 23, 2010 notice shall continue to apply. The purpose of the Council is to advise the Secretary of Commerce on matters relating to the competitiveness of the U.S. manufacturing sector and to provide a forum for regular communication between Government and the manufacturing sector.

ADDRESSES: Please submit application information to Jennifer Pilat, Office of Advisory Committees, Manufacturing Council Executive Secretariat, U.S. Department of Commerce, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230.

DATES: All applications must be received by the Office of Advisory Committees by close of business on January 14, 2010.

FOR FURTHER INFORMATION CONTACT: Jennifer Pilat, Manufacturing Council Executive Secretariat, Room 4043, 1401 Constitution Avenue, NW., Washington, DC 20230, telephone: 202-482-5896, e-mail: jennifer.pilat@trade.gov. Please visit the Manufacturing Council Web site at: <http://www.manufacturing.gov/council/index.asp?dName=council>.

SUPPLEMENTARY INFORMATION: The Office of Advisory Committees is reopening the application period for one vacant position on the Council for the current two year charter term to expire April 8, 2012. As the Department of Commerce did not receive any applications for this vacancy by the December 7th deadline, the Department is reopening the application period. The criteria and procedures for selecting the member contained in the November 23, 2010 notice continue to apply and are republished herein for convenience.

The member will be appointed to serve until the Council's charter expires on April 8, 2012. The member will be selected in accordance with applicable Department of Commerce guidelines based on his or her ability to advise the Secretary of Commerce on matters

relating to the U.S. manufacturing sector, to act as a liaison among the stakeholders represented by the membership and to provide a forum for those stakeholders on current and emerging issues in the manufacturing sector. The Council's membership reflects the diversity of American manufacturing by representing a balanced cross-section of the U.S. manufacturing industry in terms of industry sectors, geographic locations, demographics, and company size, particularly seeking the representation of small- and medium-sized enterprises. Although applications from any manufacturing sector will be considered, based on the diversity of the manufacturing industry currently represented on the Council for this charter term, the Department particularly is encouraging applicants from the high-tech or bio-tech manufacturing sectors. Additional factors which may be considered in the selection of this Council member include the candidate's proven experience in promoting, developing and marketing programs in support of manufacturing industries, job creation in the manufacturing sector, or the candidate's proven abilities to manage manufacturing organizations.

Given the duties and objectives of the Council, the Department particularly seeks applicants who are active manufacturing executives (Chief Executive Officer, President, or a comparable level of responsibility) that are leaders within their local manufacturing communities and industries. Each Council member serves as the representative of a U.S. entity in the manufacturing sector. For the purposes of eligibility, a U.S. entity is defined as a firm incorporated in the United States (or an unincorporated firm with its principal place of business in the United States) that is controlled by U.S. citizens or by another U.S. entity. An entity is not a U.S. entity if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is controlled, directly or indirectly, by non-U.S. citizens or non-U.S. entities.

The appointment to the Council will be made by the Secretary of Commerce. All Council members serve at the discretion of the Secretary of Commerce. Council members serve in a representative capacity, representing the views and interests of their particular industry sector. Council members are not special government employees.

Council members receive no compensation for their participation in Council activities. Members participating in Council meetings and

events are responsible for their travel, living and other personal expenses.

Meetings are held regularly and not less than annually, usually in Washington, DC. Members are required to attend a majority of the Council meetings. The current Council met initially on October 14, 2010 in Washington, DC. The next meeting is scheduled to take place in January 2011.

To be considered for membership, please provide the following:

1. Name and title of the individual requesting consideration.
2. A sponsor letter from the applicant on his or her entity's letterhead or, if the applicant is to represent an entity other than his or her employer, a letter from the entity to be represented, containing a brief statement of why the applicant should be considered for membership on the Council. This sponsor letter should also address the applicant's manufacturing-related experience, including any manufacturing trade policy experience.
3. The applicant's personal resume.
4. An affirmative statement that the applicant meets all eligibility criteria.
5. An affirmative statement that the applicant is not required to register as a foreign agent under the Foreign Agents Registration Act of 1938, as amended.
6. An affirmative statement that the applicant is not a federally registered lobbyist, and that the applicant understands that, if appointed, the applicant will not be allowed to continue to serve as a Council member if the applicant becomes a federally registered lobbyist.
7. Information regarding the control of the entity to be represented, including the governing structure and stock holdings as appropriate signifying compliance with the criteria set forth above.
8. The entity's size and ownership, product or service line and major markets in which the entity operates.
9. Please include all relevant contact information such as mailing address, fax, e-mail, fixed and mobile phone numbers and support staff information where relevant.

Dated: December 15, 2010.

Jennifer Pilat,

Executive Secretary, Manufacturing Council.

[FR Doc. 2010-31944 Filed 12-20-10; 8:45 am]

BILLING CODE 3510-DR-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XA098

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a public meeting of the Outreach and Education Advisory Panel (AP).

DATES: The Outreach and Education AP meeting is scheduled to begin at 1 p.m. on Tuesday, January 11, and end by 5 p.m. on Wednesday, January 12, 2011.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Charlene Ponce, Public Information Officer; *telephone:* (813) 348-1630.

SUPPLEMENTARY INFORMATION: During this Advisory Panel meeting, the Outreach and Education AP will receive an update on the Marine Resource Education Program, review a draft five-year strategic communication plan and proposed action items, as well as identify assignments and assign workgroups. The panel may also provide recommendations to the Council.

Although other non-emergency issues not on the agenda may come before the Outreach and Education AP for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the Outreach and Education AP will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Copies of the agenda can be obtained by calling (813) 348-1630.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for

sign language interpretation or other auxiliary aids should be directed to Trish Kennedy at the Council (*see ADDRESSES*) at least 5 working days prior to the meeting.

Dated: December 16, 2010.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010-31953 Filed 12-20-10; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XA099

Pacific Fishery Management Council; Public Meetings and Hearings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of reports; public meetings, and hearings.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) has begun its annual preseason management process for the 2011 ocean salmon fisheries. This document announces the availability of Pacific Council documents as well as the dates and locations of Pacific Council meetings and public hearings comprising the Pacific Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April 2011 Pacific Council meetings will be published in subsequent **Federal Register** documents prior to the actual meetings.

DATES: Written comments on the salmon management options must be received by 11:59 p.m. Pacific Time, April 3, 2011.

ADDRESSES: Documents will be available from, and written comments should be sent to, Mr. Mark Cedergreen, Chairman, Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384, *telephone:* (503) 820-2280 (voice) or (503) 820-2299 (fax). Comments can also be submitted via e-mail at PFMC.comments@noaa.gov, address, or through the internet at the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments, and include the I.D. number in the subject line of the message. For specific

meeting and hearing locations, see supplementary information.

Council Address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, *telephone:* (503) 820-2280.

SUPPLEMENTARY INFORMATION:

Schedule for Document Completion and Availability

February 17, 2011: "Review of 2010 Ocean Salmon Fisheries" will be mailed to the public and posted on the Council Web site at <http://www.pcouncil.org>.

March 3, 2011: "Preseason Report I—Stock Abundance Analysis for 2011 Ocean Salmon Fisheries" will be mailed to the public and posted on the Council Web site at <http://www.pcouncil.org>.

March 22, 2011: "Preseason Report II—Analysis of Proposed Regulatory Alternatives for 2011 Ocean Salmon Fisheries" and public hearing schedule will be mailed to the public and posted on the Council Web site at <http://www.pcouncil.org>. The report will include a description of the adopted salmon management alternatives and a summary of their biological and economic impacts.

April 22, 2011: "Preseason Report III—Analysis of Council-Adopted Ocean Salmon Management Measures for 2011 Ocean Salmon Fisheries" will be mailed to the public and posted on the Council Web site at <http://www.pcouncil.org>.

May 1, 2011: Federal regulations for 2011 ocean salmon regulations will be published in the **Federal Register** and implemented.

Meetings and Hearings

January 18–21, 2011: The Salmon Technical Team (STT) will meet at the Pacific Council office in a public work session to draft "Review of 2010 Ocean Salmon Fisheries" and to consider any other estimation or methodology issues pertinent to the 2011 ocean salmon fisheries.

February 22–25, 2011: The STT will meet at the Pacific Council office in a public work session to draft "Preseason Report I—Stock Abundance Analysis for 2011 Ocean Salmon Fisheries" and to consider any other estimation or methodology issues pertinent to the 2011 ocean salmon fisheries.

March 28–29, 2011: Public hearings will be held to receive comments on the proposed ocean salmon fishery management options adopted by the Pacific Council. Written comments received at the public hearings, and a summary of oral comments at the

hearings will be provided to the Council at its April meeting.

All public hearings begin at 7 p.m. at the following locations:

March 28, 2011: Chateau Westport, Beach Room, 710 W Hancock, Westport, WA 98595, *telephone:* (360) 268-9101.

March 28, 2011: Red Lion Hotel, Umpqua Room, 1313 N Bayshore Drive, Coos Bay, OR 97420, *telephone:* (541) 267-4141.

March 29, 2011: Red Lion Eureka, Evergreen Room, 1929 Fourth Street, Eureka, CA 95501, *telephone:* (707) 445-0844.

Although non-emergency issues not contained in the STT meeting agendas may come before the STT for discussion, those issues may not be the subject of formal STT action during these meetings. STT action will be restricted to those issues specifically listed in this document and to any issues arising after publication of this document requiring emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the STT's intent to take final action to address the emergency.

Special Accommodations

The meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820-2280 (voice), or (503) 820-2299 (fax) at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 16, 2010.

Tracey L. Thompson,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2010-31954 Filed 12-20-10; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

Office of the Secretary

National Telecommunications and Information Administration

International Trade Administration

National Institute of Standards and Technology

[Docket No. 101214614-0614-01]

RIN 0660-XA22

Information Privacy and Innovation in the Internet Economy

AGENCY: Office of the Secretary, U.S. Department of Commerce; National Telecommunications and Information Administration, U.S. Department of Commerce; International Trade Administration, U.S. Department of Commerce; National Institute of Standards and Technology, U.S. Department of Commerce.

ACTION: Notice and request for public comments.

SUMMARY: The Department of Commerce's Internet Policy Task Force is conducting a comprehensive review of the nexus between privacy policy and innovation in the Internet economy. On April 23, 2010, the Department published a Notice of Inquiry seeking comment from all Internet stakeholders on the impact of current privacy laws in the United States and around the world on the pace of innovation in the information economy. The Department now seeks further comment on its report entitled, "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework," available at <http://www.ntia.doc.gov/internetpolicytaskforce/>. Through this Notice requesting comments on the report, the Department hopes to spur further discussion with Internet stakeholders that will lead to the development of a series of Administration positions that will help develop an action plan in this important area.

DATES: Comments are due on or before January 28, 2011.

ADDRESSES: Written comments may be submitted by mail to the National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 4725, Washington, DC 20230. Submissions may be in any of the following formats: HTML, ASCII, Word, rtf, or pdf. Online submissions in electronic form may be sent to privacynoi2010@ntia.doc.gov. Paper

submissions should include a three and one-half inch computer diskette or compact disc (CD). Diskettes or CDs should be labeled with the name and organizational affiliation of the filer and the name of the word processing program used to create the document. Comments will be posted at <http://www.ntia.doc.gov/internetpolicytaskforce/>.

FOR FURTHER INFORMATION CONTACT: For questions about this Notice contact: Aaron Burstein, Office of Policy Analysis and Development, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Room 4725, Washington, DC 20230; telephone (202) 482-1880; e-mail aburstein@ntia.doc.gov; or Manu Bhardwaj, Office of Policy Analysis and Development, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-4985; e-mail mbhardwaj@ntia.doc.gov. Please direct media inquiries to NTIA's Office of Public Affairs at (202) 482-7002.

SUPPLEMENTARY INFORMATION:

Recognizing the vital importance of the Internet to U.S. innovation, prosperity, education, and political and cultural life, the Department has made it a top priority to ensure that the Internet remains open for innovation. The Department established the Internet Policy Task Force to identify leading public policy and operational challenges in the Internet environment. The Task Force leverages expertise across many bureaus, including those responsible for domestic and international information and communications technology policy, international trade, cyber security standards and best practices, intellectual property, business advocacy and export control.

Moreover, the Obama Administration has launched an initiative to develop an interagency policy structure for commercial data privacy issues. The Commerce Department's General Counsel Cameron Kerry and the Justice Department's Assistant Attorney General for the Office of Legal Policy Christopher H. Schroeder chair a recently launched subcommittee of the National Science and Technology Council that the White House has chartered to work on Privacy and Internet Policy issues. Through that vehicle, the Administration is engaging agencies throughout the U.S. Government in a conversation on commercial data privacy to ensure that

the Administration speaks with one voice and takes advantage of its many areas of expertise to promote the development of strategic and comprehensive Internet privacy policies.

Background: The Department has launched the Privacy and Innovation Initiative to identify policies that will enhance: (1) The clarity, transparency, scalability and flexibility needed to foster innovation in the information economy; and (2) the public confidence necessary for full citizen participation with the Internet. On April 23, 2010, the Department published a Notice of Inquiry seeking public comment from all Internet stakeholders, including the commercial, academic and civil society sectors, on the impact of current privacy laws in the United States and around the world on the pace of innovation in the information economy.¹ Through that Notice of Inquiry, the Department sought to understand whether current privacy laws serve consumer interests and fundamental democratic values. The Department also held a symposium on May 7, 2010, to discuss stakeholder views and to facilitate further public discussion on privacy policy in the United States.²

The Department has now prepared a report, entitled "Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework," as a vehicle to spur further discussion with Internet stakeholders on this important area of policy development.³

Request for Comment: This Notice seeks input on the report. The questions below, which also appear in Appendix A of the report, are intended to assist in identifying issues. They should not be construed as a limitation on comments that parties may submit. Comments that contain references, studies, research and other empirical data that are not widely published should include copies of the referenced materials with the submitted comments.

(1) Should baseline commercial data privacy principles, such as comprehensive FIPPs, be enacted by statute or other means, to address how current privacy law is enforced?

¹ Notice of Inquiry, Information Privacy and Innovation in the Internet Economy, 75 FR 21226 (Apr. 23, 2010), available at http://www.ntia.doc.gov/frnotices/2010/FR_PrivacyNOI_04232010.pdf. Comments received in response to this Notice of Inquiry are posted at <http://www.ntia.doc.gov/comments/100402174-0175-01/>.

² The Public Meeting Notice, 75 FR 19942 (Apr. 16, 2010), and the meeting agenda are available at <http://www.ntia.doc.gov/internetpolicytaskforce/>.

³ The report is available at <http://www.ntia.doc.gov/internetpolicytaskforce/>.

(2) How should baseline privacy principles be enforced? Should they be enforced by non-governmental entities in addition to being the basis for FTC enforcement actions?

(3) As policymakers consider baseline commercial data privacy legislation, should they seek to grant the FTC the authority to issue more detailed rule? What criteria are useful for deciding which FIPPs require further specification through rulemaking under the Administrative Procedure Act?

(4) Should baseline commercial data privacy legislation include a private right of action?

(5) What is the best way of promoting transparency so as to promote informed choices? The Task Force is especially interested in comments that address the benefits and drawbacks of legislative, regulatory, and voluntary private sector approaches to promoting transparency.

(6) What incentives could be provided to encourage the development and adoption of practical mechanisms to protect consumer privacy, such as PIAs, to bring about clearer descriptions of an organization's data collection, use, and disclosure practices?

(7) What are the elements of a meaningful PIA in the commercial context? Who should define these elements?

(8) What processes and information would be useful to assess whether PIAs are effective in helping companies to identify, evaluate, and address commercial data privacy issues?

(9) Should there be a requirement to publish PIAs in a standardized and/or machine-readable format?

(10) What are consumers' and companies' experiences with systems that display information about companies' privacy practices in contexts other than privacy policies?

(11) What are the relative advantages and disadvantages of different transparency-enhancing techniques in an online world that typically involves data from multiple sources being presented through a single user interface?

(12) Do these (dis)advantages change when one considers the increasing use of devices with more limited user interface options?

(13) Are purpose specifications a necessary or important method for protecting commercial privacy?

(14) Currently, how common are purpose specification clauses in commercial privacy policies?

(15) Do industry best practices concerning purpose specification and use limitations exist? If not, how could their development be encouraged?

(16) What incentives could be provided to encourage companies to state clear, specific purposes for using personal information?

(17) How should purpose specifications be implemented and enforced?

(18) How can purpose specifications and use limitations be changed to meet changing circumstances?

(19) Who should be responsible for demonstrating that a private sector organization's data use is consistent with its obligations? What steps should be taken if inconsistencies are found?

(20) Are technologies available to allow consumers to verify that their personal information is used in ways that are consistent with their expectations?

(21) Are technologies available to help companies monitor their data use, to support internal accountability mechanisms?

(22) How should performance against stated policies and practices be assessed?

(23) What incentives could be provided to encourage companies to adopt technologies that would facilitate audits of information use against the company's stated purposes and use limitations?

(24) Should the FTC be given rulemaking authority triggered by failure of a multi-stakeholder process to produce a voluntary enforceable code within a specified time period?

(25) How can the Commerce Department best encourage the discussion and development of technologies such as "Do Not Track"?

(26) Under what circumstances should the PPO recommend to the Administration that new policies are needed to address failure by a multi-stakeholder process to produce an approved code of conduct?

(27) How can cooperation be fostered between the National Association of Attorneys General, or similar entities, and the PPO?

(28) Do FIPPs require further regulatory elaboration to enforce, or are they sufficient on their own?

(29) What should be the scope of FTC rulemaking authority?

(30) Should FIPPs be considered an independent basis for FTC enforcement, or should FTC privacy investigations still be conducted under Federal Trade Commission Act Section 5 "unfair and deceptive" jurisdiction, buttressed by the explicit articulation of the FIPPs?

(31) Should non-governmental entities supplement FTC enforcement of voluntary codes?

(32) At what point in the development and of a voluntary, enforceable code of

conduct should the FTC review it for approval? Potential options include providing an ex ante "seal of approval," delaying approval until the code is in use for a specific amount of time, and delaying approval until enforcement action is taken against the code.

(33) What steps or conditions are necessary to make a company's commitment to follow a code of conduct enforceable?

(34) What factors should breach notification be predicated upon (e.g., a risk assessment of the potential harm from the breach, a specific threshold such as number of records, etc.)?

(35) Are there lessons from sector-specific privacy laws—their development, their contents, or their enforcement—that could inform U.S. commercial data privacy policy?

(36) Should a preemption provision of national FIPPs-based commercial data privacy policy be narrowly tailored to apply to specific practices or subject matter, leaving states free to regulate emerging technologies? Or should national policy, in the case of legislation, contain a broad preemption provision?

(37) How could a preemption provision ensure that federal law is no less protective than any existing state laws? What are useful criteria for comparatively assessing how protective different laws are?

(38) To what extent should state Attorneys General be empowered to enforce national commercial data privacy legislation?

(39) Should national FIPPs-based commercial data privacy legislation preempt state unfair and deceptive trade practices laws?

(40) The Task Force seeks case studies and statistics that provide evidence of concern—or comments explaining why concerns are unwarranted—about cloud computing data privacy and security in the commercial context. We also seek data that links any such concerns to decisions to adopt, or refrain from adopting, cloud computing services.

(41) The Task Force also seeks input on whether the current legal protections for transactional information and location information raise questions about what commercial data privacy expectations are reasonable and whether additional protections should be mandated by law. The Task Force also invites comments that discuss whether privacy protections for access to location information need clarification in order to facilitate the development, deployment and widespread adoption of new location-based services.

(42) The Task Force seeks information from the law enforcement community

regarding the use of ECPA today and how investigations might be affected by proposed amendments to ECPA's provisions.

Dated: December 16, 2010.

Gary Locke,
Secretary of Commerce.

Lawrence E. Strickling,
Assistant Secretary for Communications and Information.

Francisco J. Sánchez,
Under Secretary of Commerce for International Trade.

Patrick Gallagher,
Director, National Institute of Standards and Technology.

[FR Doc. 2010-31971 Filed 12-20-10; 8:45 am]

BILLING CODE 3510-60-P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Notice of Establishment of the White House Council for Community Solutions

AGENCY: Corporation for National and Community Service (CNCS).

ACTION: Notice of establishment of the White House Council for Community Solutions.

SUMMARY: Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), the Chief Executive Officer, CNCS, announces the establishment of the White House Council for Community Solutions by Presidential Executive Order. The Council will focus on highlighting ways to enlist more Americans and leaders across sectors to help catalyze change in communities and have an impact in addressing our nation's important goals in education, youth development and employment.

DATES: The White House Council for Community Solutions was established on December 14, 2010 by Presidential Executive Order.

ADDRESSES: The public is invited to submit written statements to the Council by electronic mail: Send written statements to the Council's electronic mailbox at

WhiteHouseCouncil@cns.gov.

The public can follow the Council's work by visiting its Web site: <http://www.serve.gov/communitysolutions>.

FOR FURTHER INFORMATION CONTACT: Susannah Washburn, Executive Director, White House Council for Community Solutions, Corporation for National and Community Service, 1201 New York Avenue, NW., Washington, DC 20525, swashburn@cns.gov.

SUPPLEMENTARY INFORMATION: In accordance with Section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. II, § 10(a), and the regulations thereunder, Susannah Washburn, Designated Federal Officer of the Council, has ordered publication of this Establishment Notice that the White House Council for Community Solutions was established on December 14, 2010 by Executive Order.

I. Background and Authority

The Council is governed by the Federal Advisory Committee Act (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees. The White House Council for Community Solutions shall advise the President on how to engage individuals, academia, non-profits, philanthropy and business to support innovative community solutions that are having a real impact in solving our Nation's pressing social issues relating to education, youth development, and employment. This new Presidential Council enlists leaders from a variety of sectors—businesses, non-profit and philanthropic organizations, universities, and community groups—to encourage the growth and maximize the impact of innovative, community-developed solutions.

II. Structure

The Council shall consist of not more than 30 members, including its Chair. All Council members shall be appointed by the President. Members shall not be Federal Government employees. In selecting individuals for appointment to the Council, appropriate consideration will be given to selecting leaders from a variety of sectors. The composition of the Council will reflect a diverse set of perspectives from across the country. Each member of the Council will be appointed to serve a term of two years. The members of the Council will be Special Government Employees (SGEs).

Meetings shall be held approximately 4 times a year and will be coordinated by the Designated Federal Officer or designee who shall approve the agenda and shall be present at all meetings. A vacancy on the Council shall be filled in the manner in which the original appointment was made and shall be subjected to any conditions that applied with respect to the original appointment. An individual chosen to fill a vacancy shall be appointed for the remainder of the term of the member replaced. The vacancy shall not affect the power of the remaining members to execute the duties of the Council.

All members of the White House Council for Community Solutions shall

adhere to the conflict of interest rules applicable to Special Government Employees as such employees are defined in 18 U.S.C. 202(a). These rules include relevant provisions in 18 U.S.C. related to criminal activity, Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), and Executive Order 12674 (as modified by Executive Order 12731). Management and support services shall be provided by the Corporation for National and Community Service (CNCS).

December 14, 2010.

Susannah Washburn,

Executive Director.

[FR Doc. 2010-31965 Filed 12-20-10; 8:45 am]

BILLING CODE 6050-SS-P

ELECTION ASSISTANCE COMMISSION

Federal Advisory Committee Act; Board of Advisors Charter Renewal

AGENCY: Election Assistance Commission.

ACTION: Notice of Charter Renewal.

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92-463), the purpose of this notice is to announce that the Election Assistance Commission (EAC) has renewed the charter for the Board of Advisors for a two-year period through December 14, 2012. The Board of Advisors is a federal advisory committee under the Federal Advisory Committee Act.

DATES: Renewed through December 14, 2012.

ADDRESSES: Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Thomas R. Wilkey, Designated Federal Officer, at (202) 566-3100. *E-mail:* boardofadvisors@eac.gov.

SUPPLEMENTARY INFORMATION: The Board of Advisors is a Federal advisory committee created by statute whose mission is to advise EAC through review of the voluntary voting system guidelines (VVSG) described in Title II Part 3 of HAVA when EAC proposes updates to the VVSG; through review of the voluntary guidance described under Title III subtitle B of HAVA; and through review of the best practices recommendations contained in the report submitted under Section 242(b) of Title II of HAVA.

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

[FR Doc. 2010-31938 Filed 12-20-10; 8:45 am]

BILLING CODE 6820-KF-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11-44-000; Docket No. CP11-47-000]

Tennessee Gas Pipeline Company, Kinetica Partners, LLC; Notice of Application and Petition for Declaratory Order

December 14, 2010.

Take notice that on December 3, 2010, Tennessee Gas Pipeline Company (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed in Docket No. CP11-44-000 an application, pursuant to section 7(b) of the Natural Gas Act (NGA), for permission and approval to abandon by sale certain natural gas facilities located offshore in the Gulf of Mexico and onshore in the State of Louisiana (Production Area Facilities). Also take notice that on December 10, 2010, Kinetica Partners, LLC (Kinetica), Lyric Center, 440 Louisiana St., Suite 425, Houston, Texas 77002, filed in Docket No. CP11-47-000, a petition for a declaratory order finding that, upon Kinetica's acquisition from Tennessee, the Production Area Facilities will be non-jurisdictional gathering facilities pursuant to section 1(b) of the NGA, all as more fully set forth in the applications which are on file with the Commission and open to public inspection.

Specifically, Tennessee proposes to sell to Kinetica certain pipeline systems consisting of approximately 800 miles of various diameter pipeline, three separation and dehydration facilities, and six offshore platforms. Kinetica asks that the Commission declare that all of the facilities will perform a gathering function. However, if the Commission determines that all but a small portion of the facilities are gathering, Kinetica requests that the Commission issue a limited jurisdiction certificate to cover such interstate transportation as Kinetica may perform on the facilities. Further, the facilities will be purchased at less than net book value. Tennessee filed, concurrently with its abandonment application in Docket No. CP11-44-000, an offer of settlement in Docket No. RP11-1597-000 addressing rate treatment and rate relief related to the proposed abandonment. Tennessee states that, because the effectiveness of the approval requested in each proceeding is precedent on approval in the other, it requests that the Commission consolidate its review of the application and offer of settlement for issuance of its findings in a single order. Kinetica requests that a single

order be issued on its petition and Tennessee's application.

Any questions regarding Tennessee's application in Docket No. CP11-44-000 should be directed to Thomas G. Joyce, manager, Certificates, Tennessee Gas Pipeline Company, 101 Louisiana Street, Houston, Texas 77002, or by calling (713) 420-3299 or faxing (713) 420-1605 or e-mail

tom.joyce@elpaso.com or to Ms. Shannon M. Miller, Principal, Prates and Regulatory Affairs, Tennessee Gas Pipeline Company, 101 Louisiana Street, Houston, Texas 77002, or by calling (713) 420-5535 or faxing (713) 420-1605 or e-mail Shannon.miller@elpaso.com.

Any questions regarding Kinetica's petition Docket No. CP11-47-000 should be directed to counsel for Kinetica, Jennifer N. Waters, Crowell & Moring LLP, 1001 Pennsylvania Avenue, NW., Washington, DC 20004; or phone at (202) 624-2715, or by fax at (202) 628-5116.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit an original and 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to

the party or parties directly involved in the protest.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: January 4, 2011.

Kimberly D. Bose,
Secretary.

[FR Doc. 2010-31933 Filed 12-20-10; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13883-000]

ORPC Alaska, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

December 14, 2010.

On November 22, 2010, ORPC Alaska, LLC filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA), proposing to study the feasibility of the Nenana RivGen Power Project (Nenana Project) to be located on the Tanana River in the vicinity of Nenana, Alaska, in the unorganized borough of Yukon-Koyukuk, Alaska. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed Nenana Project will consist of the following: (1) Up to six 50-kilowatt RivGen turbine-generator modules with a combined capacity of

300 kilowatts; (2) an approximately 450-foot-long, 24.9-kilovolt underwater transmission cable from the module site to a shore station on the north bank of the Tanana River, or an alternate transmission cable configuration that is yet to be determined; and (3) appurtenant facilities. The Nenana Project would operate 140 days per year, and the estimated annual generation would be 721 megawatt-hours.

Applicant Contact: Monty Worthington, Director of Project Development, ORPC Alaska, LLC, 725 Christensen Drive, Suite A, Anchorage, AK 99501; phone: (907) 339-7939.

FERC Contact: Jennifer Harper (202) 502-6136.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the "eLibrary" link of Commission's Web site at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number (P-13883-000) in the docket number field to access the document. For assistance, contact FERC Online Support.

Kimberly D. Bose,
Secretary.

[FR Doc. 2010-31935 Filed 12-20-10; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. CP11-43-000]****Equitrans, L.P., Big Sandy Pipeline, LLC; Notice of Joint Application for Abandonment and Certificate of Public Convenience and Necessity**

December 14, 2010.

Take notice that on December 3, 2010, Equitrans L.P. (Equitrans) and Big Sandy Pipeline, LLC (Big Sandy), 625 Liberty Avenue, Suite 1700, Pittsburgh, Pennsylvania 15222-3111, filed in Docket No. CP11-43-000, a joint application under Section 7 of the Natural Gas Act (NGA) requesting: (1) An order from the Commission pursuant to section 7(b) of the NGA authorizing Equitrans to abandon by transfer the Big Sandy Pipeline, a natural gas pipeline located in southeastern Kentucky; (2) a certificate of public convenience and necessity pursuant to section 7(c) of the NGA authorizing Big Sandy to acquire, own, and operate the Big Sandy Pipeline; (3) a blanket construction certificate issued to Big Sandy under Subpart F of Part 157 of the Commission's regulations, and (4) a blanket transportation certificate issued to Big Sandy under Subpart G of Part 284 of the Commission's regulations. The motion is on file with the Commission and open to public inspection. The filing may also be viewed on the Web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (866) 208-3676 or TTY, (202) 502-8659.

Specifically, the Commission issued Equitrans a certificate of public convenience and necessity to construct and operate the Big Sandy Pipeline in Docket No. CP06-275-000. The Big Sandy Pipeline consists of a 69.9 mile long pipeline located in Carter, Floyd, Johnson, and Lawrence Counties in Kentucky; three 3,000 horsepower compressor units in Langley, Kentucky; and appurtenant facilities. The pipeline extends from the outlet of the Kentucky Hydrocarbon gas processing facility to an interconnection with the Broad Run Lateral of Tennessee Gas Pipeline Company located in Carter County, Kentucky.

Any questions regarding this joint application should be directed to Brooksany Barrowes, Baker Botts L.L.P., 1299 Pennsylvania Avenue,

Washington, DC 20004-2400; telephone (202) 639-7887; facsimile (202) 585-4087; e-mail brooksany.barrowes@bakerbotts.com.

Pursuant to Section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing

comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: January 4, 2011.

Kimberly D. Bose,
Secretary.

[FR Doc. 2010-31934 Filed 12-20-10; 8:45 am]

BILLING CODE 6717-01-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9241-6]

Science Advisory Board Staff Office; Notification of an Upcoming Meeting of the Science Advisory Board; Ecological Processes and Effects Committee Augmented for Ballast Water**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: The Environmental Protection Agency (EPA or Agency) Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Ecological Processes and Effects Committee (EPEC). The SAB EPEC, augmented with other experts, will discuss their draft report about the effectiveness of shipboard ballast water treatment processes and ways to improve future assessments of ballast water treatment systems to minimize the impacts of invasive species in vessel ballast water discharge.

DATES: The meeting dates are Tuesday, January 25, 2011 from 8:30 a.m. to 5:30 p.m. (Eastern Time) and Wednesday, January 26, 2011 from 8:30 a.m. to 3 p.m. (Eastern Time).

ADDRESSES: The meeting will be held at The Madison Hotel, 1177 15th Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Members of the public who wish to obtain further information about this meeting may contact Ms. Iris Goodman, Designated Federal Officer (DFO). Ms. Goodman may be contacted at the EPA Science Advisory Board (1400F), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; or via telephone/voice mail; (202) 564-2164 fax (202) 265-2098; or e-mail at Goodman.iris@gmail.com.

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, Public Law 92-463, notice is hereby given that the SAB EPEC augmented with other experts will hold a public meeting to discuss their draft report that responds to charge questions about the effectiveness and reliability of treatment technologies and systems to meet discharge standard that adequately protect waters from the risk of invasion and are protective of Clean Water Act standards. The SAB was established by 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee

chartered under the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Background: Vessel ballast water discharges are a major source of nonindigenous species introductions to marine, estuarine, and freshwater ecosystems of the United States. Ballast water discharges are regulated by EPA under authority of the Clean Water Act (CWA) and the U.S. Coast Guard under authority of the Nonindigenous Aquatic Nuisance Prevention and Control Act, as amended (NANPCA).

EPA's Office of Water (OW) has requested SAB review of technical documents and available data on the effectiveness of ballast water treatment systems and advice on improving the performance of such systems. The SAB panel previously met on July 29-30, 2010 and held public teleconferences on October 26, 2010 and November 4, 2010. Additional information about this advisory activity may be found on the SAB Web site at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgrstr_activites/BW%20discharge?OpenDocument. The purpose of the meeting on January 25-26, 2011 is for the Committee to discuss their draft report.

Availability of Meeting Materials: The meeting agenda and other materials in support of the meeting will be posted on the SAB Web site at <http://www.epa.gov/sab> in advance of the meeting.

Procedures for Providing Public Input: Public comment for consideration by EPA's Federal Advisory Committees and Panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a Federal Advisory Committee is different from the process used to submit comments to an EPA Program office. Federal Advisory Committees and panels, including Scientific Advisory Committees, provide independent advice to EPA. Members of the public can submit comments for a Federal Advisory Committee to consider as it develops advice for EPA. They should send their comments directly to the Designated Federal Officer for the Relevant Advisory Committee.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes per speaker. Interested parties should contact Ms. Goodman, DFO, in writing (preferably via e-mail) at the contact information noted above by January 18, 2011 to be

placed on a list of public speakers for the meeting.

Written Statements: Written statements should be received in the SAB Staff Office no later than January 18, 2011 so that the information may be made available to the SAB Committee members for their consideration. Written statements should be supplied to the DFO in the following formats: One hard copy with original signature, and one electronic copy via e-mail (acceptable file format: Adobe Acrobat PDF, WordPerfect, MS Word, MS PowerPoint, or Rich Text files in IBM-PC/Windows 98/2000/XP format). Submitters are requested to provide two versions of each document submitted with and without signatures, because the SAB Staff Office does not publish documents with signatures on its Web sites.

Accessibility: For information on access or services for individuals with disabilities, please contact Ms. Goodman at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting to give EPA as much time as possible to process your request.

Dated: December 14, 2010.

Anthony F. Maciorowski,
Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010-32032 Filed 12-20-10; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9241-5]

Science Advisory Board Staff Office; Notification of a Public Meeting of the Environmental Economics Advisory Committee Augmented for Valuing Mortality Risk Reductions**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces a public meeting of the Environmental Economics Advisory Committee Augmented for Mortality Risk Valuation to conduct a review of EPA's White Paper "Valuing Mortality Risk Reduction for Environmental Policy" (December 10, 2010).

DATES: The public meeting will be held on Thursday, January 20, 2011 from 8:30 a.m. to 5 p.m. (Eastern Time) and Friday, January 21, 2011 from 8:30 a.m. to 12 p.m. (Eastern Time).

ADDRESSES: The public meeting will be held at the Madison Hotel, 1177 15th Street, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the meeting may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), EPA Science Advisory Board (1400R), U.S. Environmental Protection Agency, 1300 Pennsylvania Avenue, NW., Washington, DC 20460; via telephone/voice mail (202) 564-2073; fax (202) 565-2098; or e-mail at stallworth.holly@epa.gov. General information concerning the SAB can be found on the EPA Web site at <http://www.epa.gov/sab>.

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App., notice is hereby given that the SAB Environmental Economics Advisory Committee (EEAC) Augmented for Mortality Risk Valuation will hold a public meeting to discuss the valuation of mortality risk reduction for regulatory analysis. The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

The U.S. Environmental Protection Agency (EPA) uses a value of statistical life (VSL) to express the benefits of mortality risk reductions in monetary terms for use in benefit cost analyses of its rules and regulations. EPA has used the same central default value (adjusted for inflation) in its primary analyses since 1999 when the Agency updated its *Guidelines for Preparing Economic Analyses* (2000). Prior to the release of the *Guidelines*, EPA sought advice from the Science Advisory Board's Environmental Economics Advisory Committee (EEAC) on the appropriateness of this estimate and its derivation. In 2000, EPA also requested advice from the SAB EEAC on the appropriateness of making adjustments to VSL estimates to capture risk and population characteristics associated with fatal cancer risks. The SAB responded with the report, "An SAB Report on EPA's *White Paper Valuing the Benefits of Fatal Cancer Risk Reduction*" (EPA-SAB-EEAC-00-010), available on the SAB Web site at <http://yosemite.epa.gov/sab/SABPRODUCT.NSF/>

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In addition, as part of the recent process for updating its guidance on the conduct of benefit cost analysis, EPA embarked on a series of meetings with the SAB-EEAC on issues related to mortality risk valuation. In 2004, the SAB EEAC held a consultation to discuss the robustness of estimates from the mortality risk valuation literature. In 2006, the SAB EEAC reviewed an EPA paper on the application of meta-analysis techniques to deriving estimates for the value of mortality risk reduction as well as a paper on appropriate and available methods for valuing mortality risk reductions when affected populations have relatively short remaining life expectancy. The "SAB Advisory on EPA's Issues in Valuing Mortality Risk Reduction" (EPA-SAB-08-001) may be found at: [http://yosemite.epa.gov/sab/SABPRODUCT.NSF/4128007E7876B8F0852573760058A978/\\$File/sab-08-001.pdf](http://yosemite.epa.gov/sab/SABPRODUCT.NSF/4128007E7876B8F0852573760058A978/$File/sab-08-001.pdf).

EPA's National Center for Environmental Economics has requested a review of a White Paper that highlights additional key topics related to the valuation of mortality risks reductions. On July 8, 2009 in 74 FR 32607-32608, the SAB Staff Office solicited nominations of experts to augment the EEAC. Thus, for the January 20-21, 2011 meeting, EEAC will be joined by additional experts to review EPA's White Paper. Key issues described in the white paper include:

—**Terminology:** Replacing the term "Value of Statistical Life," which has often been misunderstood as a measure of the value of individual lives, with the term "Value of Mortality Risk Reductions" (VMR). This change in terminology should help to avoid some of the confusion surrounding the interpretation of the VSL. It would not affect the results of the analysis itself, but rather how the benefits of reduced risks are reported and described.

—**Cancer Differential:** Taking into account potential differences in how much people are willing to pay for reductions in their risks of dying from cancer relative to other causes when estimating the benefits of policies that reduce exposure to cancer-causing pollutants.

—**Altruistic Effects:** Taking into account potential differences in individuals' willingness to pay for "public" risk reductions that may affect many people (such as reductions of pollution to public drinking water) relative to their willingness to pay for

"private" risk reductions that only affect the individual (such as choosing to install a water filter in one's home). Many of the published estimates of willingness to pay are for private risk reductions, but since EPA regulations generally result in "public" risk reductions, accounting for these differences when estimating benefits could be important.

Technical Contacts: Any questions concerning EPA's White Paper should be directed to Dr. Nathalie Simon, NCEE, at (202) 566-2347 or simon.nathalie@epa.gov.

Availability of Meeting Materials: EPA's White Paper may be found posted at [http://yosemite.epa.gov/ee/epa/eeerm.nsf/vwAN/EE-0563-1.pdf/\\$file/EE-0563-1.pdf](http://yosemite.epa.gov/ee/epa/eeerm.nsf/vwAN/EE-0563-1.pdf/$file/EE-0563-1.pdf). A meeting agenda, charge questions, a roster for the EEAC Augmented for Mortality Risk Valuation and other materials for the meeting will be placed on the SAB Web site at <http://www.epa.gov/sab>.

Procedures for Providing Public Input: Interested members of the public may submit relevant written or oral information for consideration on the topics included in this advisory activity.

Oral Statements: To be placed on the public speaker list for the January 20-21, 2011 meeting, interested parties should notify Dr. Holly Stallworth, DFO, by e-mail no later than January 14, 2011. Individuals making oral statements will be limited to three minutes per speaker. **Written Statements:** Written statements for the meeting should be received in the SAB Staff Office by January 14, 2011 so that the information may be made available to the SAB Panel for its consideration prior to this meeting. Written statements should be supplied to the DFO via e-mail (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files in IBM-PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at the phone number or e-mail address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: December 15, 2010.

Anthony F. Maciorowski,
Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010-31999 Filed 12-20-10; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9241-7]

Science Advisory Board Staff Office; Request for Nominations of Experts To Augment the SAB Drinking Water Committee (DWC)**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Notice.**SUMMARY:** The EPA Science Advisory Board (SAB) Staff Office is requesting public nominations of experts to augment the SAB Drinking Water Committee (DWC) to review technical studies examining the effectiveness of partial lead service line replacements.**DATES:** Nominations should be submitted by January 11, 2011 per instructions below.**FOR FURTHER INFORMATION CONTACT:** Any member of the public wishing further information regarding this Notice and Request for Nominations may contact Mr. Aaron Yeow, Designated Federal Officer (DFO), SAB Staff Office, by telephone/voice mail at (202) 564-2050; by fax at (202) 565-2098 or via e-mail at ayeow.aaron@epa.gov. General information concerning the EPA Science Advisory Board can be found on the EPA SAB Web site at <http://www.epa.gov/sab>.**SUPPLEMENTARY INFORMATION:**

Background: The SAB (42 U.S.C. 4365) is a chartered Federal Advisory Committee that provides independent scientific and technical peer review, advice, consultation, and recommendations to the EPA Administrator on the technical basis for EPA actions. As a Federal Advisory Committee, the SAB conducts business in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and related regulations. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

Exposure to lead through drinking water results primarily from the corrosion of lead pipes and plumbing materials. EPA's Office of Water (OW) promulgated the Lead and Copper Rule (LCR) to minimize the amount of lead in drinking water. The LCR requires water systems that are not able to limit lead corrosion through treatment to replace service lines (pipes connecting buildings to water distribution mains) that are made from lead. Water systems must replace the portion of the lead service line owned by the system and offer to replace the customer's portion at the customer's cost. When customers do

not replace their portion of the service line, the situation is called a "partial lead service line replacement." OW has requested the SAB to review and provide advice on recent studies examining the effectiveness of partial lead service line replacements. SAB's advice will guide EPA's determination of whether the scientific foundation for the regulatory requirement allowing the use of partial lead service line replacement may need to be modified in light of more recent scientific studies. The SAB Staff Office will augment the DWC, which provides advice to the EPA Administrator through the chartered SAB on the technical aspects of EPA's national drinking water standards program, to review these studies.

Request for Nominations

To augment expertise on the SAB DWC, the SAB Staff Office is seeking nominations of recognized experts with demonstrated expertise and research in one or more of the following areas related to lead: environmental engineering, drinking water exposure assessment, epidemiology, statistics, and risk assessment.

Availability of the review materials:

The review materials will be made available on the SAB Web site. For questions concerning the review materials, please contact Mr. Matt Robinson at (202) 564-2802, or robinson.mattm@epa.gov.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals in the areas of expertise described above for possible service on this expert Panel. Nominations should be submitted in electronic format (which is preferred over hard copy) following the instructions for "Nominating Experts to Advisory Panels and Ad Hoc Committees Being Formed" provided on the SAB Web site. The instructions can be accessed through the "Nomination of Experts" link on the blue navigational bar on the SAB Web site at <http://www.epa.gov/sab>. To receive full consideration, nominations should include all of the information requested below.

EPA's SAB Staff Office requests contact information about the person making the nomination; contact information about the nominee; the disciplinary and specific areas of expertise of the nominee; the nominee's curriculum vita; sources of recent grant and/or contract support; and a biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other national

advisory committees or national professional organizations.

Persons having questions about the nomination procedures, or who are unable to submit nominations through the SAB Web site, should contact Mr. Aaron Yeow, DFO, as indicated above in this notice. Nominations should be submitted in time to arrive no later than January 11, 2011. EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The EPA SAB Staff Office will acknowledge receipt of nominations. The names and bio-sketches of qualified nominees identified by respondents to this **Federal Register** notice, and additional experts identified by the SAB Staff, will be posted in a List of Candidates on the SAB Web site at <http://www.epa.gov/sab>. Public comments on this List of Candidates will be accepted for 21 calendar days. The public will be requested to provide relevant information or other documentation on nominees that the SAB Staff Office should consider in evaluating candidates.

For the EPA SAB Staff Office, a review panel includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge. In forming this expert panel, the SAB Staff Office will consider public comments on the List of Candidates, information provided by the candidates themselves, and background information independently gathered by the SAB Staff Office. Selection criteria to be used for Panel membership include: (a) Scientific and/or technical expertise, knowledge, and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest; (d) absence of an appearance of a lack of impartiality; and (e) skills working in committees, subcommittees and advisory panels; and, (f) for the Panel as a whole, diversity of expertise and viewpoints.

The SAB Staff Office's evaluation of an absence of financial conflicts of interest will include a review of the "Confidential Financial Disclosure Form for Special Government Employees Serving on Federal Advisory Committees at the U.S. Environmental Protection Agency" (EPA Form 3110-48). This confidential form allows Government officials to determine whether there is a statutory conflict

between that person's public responsibilities (which includes membership on an EPA Federal advisory committee) and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded from the following URL address <http://www.epa.gov/sab/pdf/epaform3110-48.pdf>.

The approved policy under which the EPA SAB Office selects subcommittees and review panels is described in the following document: *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board* (EPA-SAB-EC-02-010), which is posted on the SAB Web site at <http://www.epa.gov/sab/pdf/ec02010.pdf>.

Dated: December 14, 2010.

Vanessa T. Vu,

Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2010-32031 Filed 12-20-10; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL MARITIME COMMISSION

Performance Review Board

AGENCY: Federal Maritime Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given of the names of the members of the Performance Review Board.

FOR FURTHER INFORMATION CONTACT:

Harriette H. Charbonneau, Director of Human Resources, Federal Maritime Commission, 800 North Capitol Street, NW., Washington, DC 20573.

SUPPLEMENTARY INFORMATION: Section 4314(c) (1) through (5) of title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more performance review boards. The board shall review and evaluate the initial appraisal of a senior executive's performance by the supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive.

Richard A. Lidinsky, Jr.,
Chairman.

The Members of the Performance Review Board are:

1. Joseph E. Brennan, Commissioner.
2. Rebecca F. Dye, Commissioner.
3. Michael A. Khouri, Commissioner.
4. Clay G. Guthridge, Administrative Law Judge.
5. Erin M. Wirth, Administrative Law Judge.

6. Florence A. Carr, Deputy Managing Director.

7. Rebecca A. Fenneman, General Counsel.

8. Karen V. Gregory, Secretary.

9. Vern W. Hill, Director, Office of Consumer Affairs and Dispute Resolution Services.

10. Peter J. King, Director, Bureau of Enforcement.

11. Sandra L. Kusumoto, Director, Bureau of Certification and Licensing.

12. Ronald D. Murphy, Managing Director.

13. Austin L. Schmitt, Director, Bureau of Trade Analysis.

[FR Doc. 2010-32016 Filed 12-20-10; 8:45 am]

BILLING CODE 6730-01-P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 7, 2011.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Tribble Family Partners, L.P.; Vera Tribble, general partner; David Tribble, limited partner; all of Unionville, Missouri; and Diana Bennett, limited partner, Bethany, Missouri*, to retain shares of Northern Missouri Bancshares, Inc., parent of Farmers Bank of Northern Missouri, National Association, both in Unionville, Missouri.

Board of Governors of the Federal Reserve System, December 16, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010-31990 Filed 12-20-10; 8:45 am]

BILLING CODE 6210-01-P

FEDERAL TRADE COMMISSION

[File No. 082 3158]

The Dannon Company, Inc.; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis To Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 18, 2011.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "Dannon, File No. 082 3158" to facilitate the organization of comments. Please note that your comment—including your name and your state—will be placed on the public record of this proceeding, including on the publicly accessible FTC Web site, at <http://www.ftc.gov/os/publiccomments.shtm>.

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).¹

¹ The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: <https://ftcpublic.commentworks.com/ftc/dannon> and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: <https://ftcpublic.commentworks.com/ftc/dannon>. If this Notice appears at <http://www.regulations.gov/search/index.jsp>, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC Web site at <http://www.ftc.gov/> to read the Notice and the news release describing it.

A comment filed in paper form should include the "Dannon, File No. 082 3158" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW., Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC Web site, to the extent practicable, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC Web site. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at <http://www.ftc.gov/ftc/privacy.shtm>.

FOR FURTHER INFORMATION CONTACT: Richard Cleland (202-326-3088), Bureau of Consumer Protection, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 of the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis To Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for December 15, 2010), on the World Wide Web, at <http://www.ftc.gov/os/actions.shtm>. A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order To Aid Public Comment

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from The Dannon Company, Inc. ("respondent"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves the advertising and promotion of DanActive, a probiotic dairy drink, and Activia, a probiotic yogurt. According to the FTC complaint, respondent represented, in various advertisements, that drinking DanActive reduces the likelihood of getting a cold or the flu. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act. The complaint also alleges that respondent represented that clinical studies prove that drinking

DanActive reduces the likelihood of getting a cold or the flu. The complaint alleges that these claims are false and thus violate the FTC Act.

With respect to Activia, the complaint alleges that respondent represented, in various advertisements, that eating one serving of Activia daily relieves temporary irregularity and helps with slow intestinal transit time. The complaint alleges that these claims are unsubstantiated and thus violate the FTC Act. The complaint also alleges that respondent represented that clinical studies prove that eating one serving of Activia daily relieves temporary irregularity and helps with slow intestinal transit time. The complaint alleges that these claims are false and thus violate the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. The order covers representations made in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product, in or affecting commerce. The order defines a covered product as: (a) Any yogurt, including but not limited to, Activia yogurt; (b) any dairy drink; and (c) any food or drink not covered by the foregoing that contains a probiotic, including, but not limited to, DanActive.

Part I of the consent order is designed to address the complaint allegations concerning respondent's allegedly unsubstantiated representations that drinking DanActive reduces the likelihood of getting a cold or the flu. Part I prohibits respondent from making representations that any covered product reduces the likelihood of getting a cold or the flu unless the representation is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration ("FDA") pursuant to the Nutrition Labeling and Education Act of 1990 ("NLEA"). Under this provision, therefore, respondent cannot claim that a covered product reduces the likelihood of getting a cold or the flu unless the FDA has issued a regulation authorizing the claim based on a finding that there is significant scientific agreement among experts qualified by scientific training and experience to evaluate such claims, considering the totality of publicly available scientific evidence. As noted in the Commission's Enforcement Policy Statement on Food Advertising, "[t]he Commission regards the 'significant scientific agreement' standard, as set forth in the NLEA and FDA's regulations, to be the principal guide to

Commission's General Counsel, consistent with applicable law and the public interest. See FTC Rule 4.9(c), 16 CFR 4.9(c).

what experts in the field of diet-disease relationships would consider reasonable substantiation for an unqualified health claim." Enforcement Policy Statement on Food Advertising (1994), available at <http://www.ftc.gov/bcp/policystmt/ad-food.shtm>. Thus, although the Enforcement Policy Statement does not say that the only way a food advertiser can adequately substantiate a disease risk-reduction claim is through FDA authorization, the consent order provision requiring FDA pre-approval before respondent makes a reduced cold or flu likelihood claim for its covered products in the future will facilitate compliance with and enforcement of the order and is reasonably related to the violations alleged.

Respondent may decide to make an advertising claim characterizing limited scientific evidence supporting the relationship between a covered product and a reduced likelihood of getting a cold or the flu. However, if the net impression of that advertising is that the covered product reduces the likelihood of getting a cold or the flu, and not merely that there is limited scientific evidence supporting the claim, the advertisement would be covered under Part I. The Commission notes that its experience and research show that it is very difficult to adequately qualify a disease risk-reduction claim in advertising to indicate that the science supporting the claimed effect is limited. In other words, reasonable consumers may interpret an advertisement to mean that the product will reduce the likelihood of getting a cold or the flu, even if respondent includes language indicating that the science supporting the effect is limited in some way. However, if respondent possesses reliable empirical testing demonstrating that the net impression of an advertisement making a qualified claim for a covered product does not convey that it will reduce the likelihood of getting a cold or the flu, then that claim would be covered under Part IV of the order.

Although Part I requires FDA approval before respondent can make claims that a covered product reduces the likelihood of getting a cold or the flu, the Commission does not intend Part I to limit respondent to using the precise language specified in an FDA-approved health claim. To the contrary, if the FDA has approved a claim that a covered product reduces the likelihood of getting a cold or the flu, respondent may use a variety of words and images to communicate that claim in its advertising. Conversely, regardless of the particular words or images used, if the net impression of an advertisement

is that a covered product reduces the likelihood of getting a cold or the flu, then for the ad to comply with the order, the FDA must have authorized a health claim based on significant scientific agreement that such product provides such a benefit.

Part II of the consent order prohibits respondent from making representations that eating one serving of Activia yogurt daily relieves temporary irregularity and helps with slow intestinal transit time unless the representation is non-misleading and it conveys that eating three servings a day is required to obtain the benefit. Part II further provides, however, that the order does not prohibit respondent from representing that the benefit can be achieved from eating less than three servings a day if such claim is non-misleading and respondent possesses and relies upon competent and reliable scientific evidence that substantiates that such representation is true.

For purposes of Part II, competent and reliable scientific evidence means at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true. For purposes of the order, essentially equivalent product means a product that contains the identical ingredients, except for inactive ingredients (e.g., inactive binders, flavors, preservatives, colors, fillers, excipients), in the same form and dosage, and with the same route of administration (e.g., orally, sublingually), as the covered product; provided that the covered product may contain additional ingredients or other differences in formulation to affect taste, texture, or nutritional value (so long as the other differences do not change the form of the product or involve the ingredients from which the functional benefit is derived), if reliable scientific evidence generally accepted by experts in the field demonstrates that the amount of additional ingredients, combination of additional ingredients, and any other differences in formulation are unlikely to impede or inhibit the effectiveness of the ingredients in the essentially equivalent product.

Part III of the consent order prohibits respondent from making representations that any covered product other than Activia yogurt relieves temporary irregularity and helps with slow intestinal transit time unless the

representation is non-misleading and respondent possesses and relies upon competent and reliable scientific evidence that substantiates that such representation is true. For purposes of Part III, competent and reliable scientific evidence means at least two adequate and well-controlled human clinical studies of the product, or of an essentially equivalent product, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true.

Part IV of the consent order prohibits respondent from making representations, other than representations covered under Parts I through III, about the health benefits, performance, or efficacy of any covered product, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of Part IV, competent and reliable scientific evidence means tests, analyses, research, studies, or other evidence that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results.

Part V of the consent order prohibits respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research, including but not limited to any misrepresentation that a covered product is clinically proven (1) to reduce the likelihood of getting a cold or flu, or (2) to relieve temporary irregularity or help with slow intestinal transit time.

Part VI of the consent order provides that nothing in the order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the NLEA.

Parts VII, VIII, IX, and X of the consent order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to its personnel; to notify the Commission of changes in

corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XI provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2010-31936 Filed 12-20-10; 8:45 am]

BILLING CODE 6750-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Input for a Strategic Plan for Federal Youth Policy

AGENCY: Office of the Assistant Secretary for Planning and Evaluation, DHHS.

ACTION: Notice of request for public comments.

SUMMARY: The U.S. Department of Health and Human Services, in its role as the Chair of the Interagency Working Group on Youth Programs requests public comments to inform the development of a strategic plan for Federal youth policy.

DATES: Comments must be received on or before January 20, 2011.

ADDRESSES: You may submit comments electronically through the FindYouthInfo.gov Web site via <http://www.findyouthinfo.gov/provideinput.aspx>. You may e-mail them to FindYouthInfo@air.org. You may mail them to Sarah Potter, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 200 Independence Avenue, SW., Room 404E, Washington, DC 20201. To ensure proper handling, in the lower left hand corner of the envelope and in your correspondence clearly reference "Strategic Plan for Federal Youth Policy."

FOR FURTHER INFORMATION CONTACT: Visit the Web site for the Interagency Working Group on Youth Programs at <http://www.FindYouthInfo.gov>; call FindYouthInfo.gov helpline at 1-877-231-7843 (this is a toll-free number); or e-mail your inquiry to FindYouthInfo@air.org.

SUPPLEMENTARY INFORMATION:

I. Overview of the Interagency Working Group on Youth Programs and FindYouthInfo.gov

The Interagency Working Group on Youth Programs is comprised of staff from twelve Federal agencies that support programs and services that focus on youth: the U.S. Department of Agriculture; U.S. Department of Commerce; U.S. Department of Defense; U.S. Department of Education; U.S. Department of Health and Human Services (Chair); U.S. Department of Housing and Urban Development; U.S. Department of Justice (Vice-Chair); U.S. Department of Labor; U.S. Department of the Interior; U.S. Department of Transportation; Corporation for National and Community Service; and Office of National Drug Control Policy.

The Working Group seeks to promote achievement of positive results for at-risk youth through the following activities:

- Promoting enhanced collaboration at the Federal, State, and local levels, including with faith-based and other community organizations, as well as among families, schools and communities, in order to leverage existing resources and improve outcomes;
- Disseminating information about critical resources, including evidence-based programs, to assist interested citizens and decision-makers, particularly at the community level, to plan, implement, and participate in effective strategies for at-risk youth;
- Developing an overarching strategic plan for Federal youth policy, as well as recommendations for improving the coordination, effectiveness and efficiency of youth programs, using input from community stakeholders, including youth; and
- Producing a Federal Web site, FindYouthInfo.gov, to promote effective community-based efforts to reduce the factors that put youth at risk and to provide high-quality services to at-risk youth.

II. Background on the Strategic Plan for Federal Youth Policy

On March 11, 2009, the Congress passed the Omnibus Appropriations Act, 2009 (Pub. L. 111-8). The House Appropriations Committee Print, Division F—Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations directed the Interagency Working Group on Youth Programs to solicit input from young people, State children's cabinet directors, and non-profit organizations on youth programs and policies; develop an overarching strategic plan for Federal youth policy; and prepare recommendations to improve the coordination, effectiveness, and efficiency of programs affecting youth.

The Interagency Working Group on Youth Programs developed a framework to guide development of the strategic plan for Federal youth policy. This framework is available online at <http://www.findyouthinfo.gov/provideinput.aspx>. The framework illustrates how programs and practices—such as (1) Physical and mental health and wellness; (2) education; (3) juvenile justice intervention; (4) enrichment opportunities; (5) safety; (6) service learning; (7) employment; and (8) housing—pertain to youth up to age 24. The framework acknowledges that programs and policies are designed to meet the diverse needs of youth, including the general youth population, youth involved in systems, and special youth populations. The Working Group is focusing on youth across several developmental stages, including (1) early adolescence (ages under 14); (2) middle adolescence (ages 15–17); and (3) late adolescence/early adulthood (ages 18–24). The Working Group is focused on three overarching outcomes for youth through this framework: (1) basic needs: health, safety, and wellness; (2) school, family, and community engagement and connections; and (3) education, training, employment, transitions, and readiness for careers and adulthood.

III. Guiding Questions for Commenters

The Interagency Working Group on Youth Programs has identified a number of questions to focus on, and the Working Group is particularly interested in receiving comments addressing some or all of these questions.

(a) What is the single most important thing youth need to be successful?

(b) What programs really make a difference in the lives of youth? How do you know this?

(c) What are the barriers to collaborating to improving youth outcomes and how can these barriers be removed?

(d) What can Federal agencies do to assist? What are your ideas for Federal policy to improve the coordination, effectiveness, and efficiency of programs affecting youth?

(e) How can youth be engaged in these efforts?

Authority: Division F, Pub. L. 111-8; E.O. 13459, 73 FR 8003, February 12, 2008.

Dated: December 10, 2010.

Sherry Glied,

Assistant Secretary for Planning and Evaluation.

[FR Doc. 2010-31975 Filed 12-20-10; 8:45 am]

BILLING CODE 4154-05-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Office of the Secretary****Notice of Interest Rate on Overdue Debts**

Section 30.18 of the Department of Health and Human Services' claims collection regulations (45 CFR part 30) provides that the Secretary shall charge an annual rate of interest, which is determined and fixed by the Secretary of the Treasury after considering private consumer rates of interest on the date that the Department of Health and Human Services becomes entitled to recovery. The rate cannot be lower than the Department of Treasury's current value of funds rate or the applicable rate determined from the "Schedule of Certified Interest Rates with Range of Maturities" unless the Secretary waives interest in whole or part, or a different rate is prescribed by statute, contract, or repayment agreement. The Secretary of the Treasury may revise this rate quarterly. The Department of Health and Human Services publishes this rate in the **Federal Register**.

The current rate of 10¾%, as fixed by the Secretary of the Treasury, is certified for the quarter ended September 30, 2010. This interest rate is effective until the Secretary of the Treasury notifies the Department of Health and Human Services of any change.

Dated: December 9, 2010.

Molly P. Dawson,

Director, Office of Financial Policy and Reporting.

[FR Doc. 2010-31979 Filed 12-20-10; 8:45 am]

BILLING CODE 4150-04-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Meeting of the Advisory Committee on Minority Health**

AGENCY: Office of Minority Health, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice of meeting.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the Department of Health and Human Services (DHHS) is hereby giving notice that the Advisory Committee on Minority Health (ACMH) will hold a meeting. This meeting is open to the public. Preregistration is required for both public attendance and comment. Any individual who wishes to attend the meeting and/or participate in the

public comment session should e-mail acmh@osophs.dhhs.gov.

DATES: The meeting will be held on Monday, January 10, 2011 from 9 a.m. to 5 p.m. and Tuesday, January 11, 2011 from 9 a.m. to 1 p.m.

ADDRESSES: The meeting will be held at the Doubletree Hotel, 1515 Rhode Island Ave., NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Ms. Monica A. Baltimore, Tower Building, 1101 Wootton Parkway, Suite 600, Rockville, Maryland 20852. Phone: 240-453-2882 Fax: 240-453-2883.

SUPPLEMENTARY INFORMATION: In accordance with Public Law 105-392, the ACMH was established to provide advice to the Deputy Assistant Secretary for Minority Health in improving the health of each racial and ethnic minority group and on the development of goals and specific program activities of the Office of Minority Health.

Topics to be discussed during this meeting will include increasing the health care workforce and strategies to improve the health of racial and ethnic minority populations through the development of health policies and programs that will help eliminate health disparities, as well as other related issues.

Public attendance at the meeting is limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person at least fourteen (14) business days prior to the meeting. Members of the public will have an opportunity to provide comments at the meeting. Public comments will be limited to three minutes per speaker. Individuals who would like to submit written statements should mail or fax their comments to the Office of Minority Health at least seven (7) business days prior to the meeting. Any members of the public who wish to have printed material distributed to ACMH committee members should submit their materials to the Executive Secretary, ACMH, Tower Building, 1101 Wootton Parkway, Suite 600, Rockville, Maryland 20852, prior to close of business December 30, 2010.

Dated: December 9, 2010.

Garth N. Graham,

Deputy Assistant Secretary for Minority Health, Office of Minority Health, Office of the Assistant Secretary for Health, Office of the Secretary, U.S. Department of Health and Human Services.

[FR Doc. 2010-32006 Filed 12-20-10; 8:45 am]

BILLING CODE 4150-29-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Centers for Disease Control and Prevention**

[30Day-11-0776]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639-5960 or send an e-mail to omb@cdc.gov. Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395-5806. Written comments should be received within 30 days of this notice.

Proposed Project

Economic Analysis of the National Breast and Cervical Cancer Early Detection Program—Revision—Division of Cancer Prevention and Control, National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention, (CDC).

Background and Brief Description

CDC administers the National Breast and Cervical Cancer Early Detection Program (NBCCEDP), the largest organized cancer screening program in the United States. The NBCCEDP provides critical breast and cervical cancer screening services to uninsured and underserved low-income women in all 50 states, the District of Columbia, five U.S. territories, and 12 American Indian/Alaska Native organizations. The program provides breast and cervical cancer screening for eligible women who participate in the program as well as diagnostic procedures for women who have abnormal findings. During the past decade, the NBCCEDP has provided over 9.2 million breast and cervical cancer screening and diagnostic exams to over 3.7 million low-income women. Those who are diagnosed with cancer through the program are eligible for Medicaid coverage through the Breast and Cervical Cancer Prevention and Treatment Act passed by Congress in 2000.

In 2008, CDC received OMB approval to collect one year of activity-based economic cost data from NBCCEDP grantees. In 2009, CDC received OMB approval to collect two additional years of cost data for FY09 and FY10 (OMB

No. 0920–0776, exp. 03/31/2011). Respondents are the 68 programs participating in the NBCCEDP. Information is collected electronically through a web-based Cost Assessment Tool (CAT) and includes: Staff and consultant salaries, screening costs, contracts and material costs, provider payments, in-kind contributions, administrative costs, allocation of funds and staff time devoted to specific program activities.

CDC requests OMB approval for a six-month extension of the current approval period in order to complete the data collection. Based on our experience with previous cycles of data collection, 20 grantees (30% of the total 68 grantees) will not be able to meet the current data collection deadline of 3/31/2011. These programs will complete

their fiscal year (FY) closeout process in April or May 2011. As a result, these programs will not be prepared to submit data to CDC until their FY is complete and records have been reconciled. The requested six-month extension period will provide the time they need to complete their FY10 closeout and conduct data quality checks before submitting information to CDC. The requested six-month extension will improve the quality and completeness of information used for planned data analysis, and ensure CDC’s authority to receive late submissions.

The information is being collected to support activity-based analysis of the costs and cost-effectiveness of the NBCCEDP. The information will be used to assess the costs of various program components, identify factors that impact

average cost, perform cost-effectiveness analysis, and to develop a resource allocation tool for ensuring the most appropriate use of limited program resources. All information will be collected electronically.

NBCCEDP grantees currently report information on screening and diagnosis volumes (the effectiveness measures for the program) as part of the Minimum Data Elements (MDE) for the NBCCEDP (OMB 0920–0571, exp. 11/30/2012). Cost information to be collected through the CAT will complement information currently collected through the MDE project.

There are no costs to respondents other than their time. The total estimated annualized burden hours are 440.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Number of respondents	Number of responses per respondent	Average burden (in hrs)
NBCCEDP grantee	20	1	22

Catina Conner,
Acting Reports Clearance Officer, Centers for Disease Control and Prevention.
[FR Doc. 2010–31981 Filed 12–20–10; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention
[60 Day–11–11BH]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Carol Walker, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to omb@cdc.gov.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have

practical utility; (b) the accuracy of the agency’s estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

The Division of Behavior Surveillance (DBS) Gulf States Population Survey—New—Public Health Surveillance Program Office (PHSPO), Office of Surveillance, Epidemiology, and Laboratory Services (OSELs), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

On April 20, 2010, the BP Deepwater Horizon oil rig exploded in the Gulf of Mexico spilling more than 4.9 million barrels of oil into the Gulf. The lives and livelihoods of persons residing in the Gulf coastal communities were affected by this event due to loss of work, disruption in the fishing and tourism industries, and the effect on the physical environment in which they live.

An ongoing public health concern following the spill is the effect on the

mental and behavioral health of populations living in and around the Gulf region and access to the mental health services required to meet that need.

On October 7, 2010 the Office of Management and Budget (OMB) granted emergency clearance (OMB control # 0920–0868, expiration date April 30, 2011) to CDC’s Public Health Surveillance Program Office (PHSPO), Division of Behavioral Surveillance (DBS) to conduct a survey to monitor the mental and behavioral health status of this affected population. Data collection for the DBS Gulf States Population Survey began on December 14, 2010 and will continue monthly for a one-year period. No data was collected from October 2010 to December 2010, because the sampling and data collecting contracts were pending receipt of funding.

Using the existing capacity and infrastructure of the Behavioral Risk Factor Surveillance System (BRFSS), DBS implemented a standalone survey designed to monitor mental and behavioral health indicators in the adult population in selected coastal counties affected by the oil spill. The survey includes health related questions taken from the ongoing BRFSS as well as additional questions taken from standardized scales or from other surveys designed to measure anxiety, depression, and potential stress-associated physical health effects.

The survey questionnaire was developed by DBS in partnership with the Substance Abuse and Mental Health Services Administration (SAMHSA) and state public health and mental health departments from Louisiana, Mississippi, Alabama, and Florida, where the survey is being conducted.

Coastal counties within 32 miles of an area where fishing was closed due to the Deepwater Horizon Event were selected for inclusion. These include the following Gulf coast counties:

Louisiana: Assumption Parish, Calcasieu Parish, Cameron Parish, Iberia Parish, Jefferson Parish, Jefferson Davis Parish, Lafourche Parish, Orleans Parish, Plaquemines Parish, St. Bernard Parish, St. Charles Parish, St. Mary Parish, St. Tammany Parish, Tangipahoa Parish, Terrebonne Parish, Vermilion Parish.

Mississippi: Hancock County, Harrison County, Jackson County.
Alabama: Baldwin County, Mobile County.

Florida: Escambia County, Okaloosa County, Santa Rosa County, Walton County.

The objective of the survey is to provide state health and mental health departments, SAMHSA, and other appropriate organizations data they need to assess the need for mental and behavioral health services in the selected counties and to inform the provision of those services.

The telephone survey will collect data from a random sample of households with land-line telephones in the selected counties. Approximately 2,500 interviews will be completed each month. Adults 18 years or older will be asked to take part in the survey, but only one adult per household will be

interviewed. Potential respondents will be notified through an introductory script that participation is voluntary and they will not be compensated for participating. For those who agree to participate, interviews should last approximately 20–25 minutes.

Since the OMB emergency clearance for the DBS Gulf States Population Survey expires April 30, 2011, DBS is submitting an information collection request (ICR) for the portion of the data collection (May–December, 2011) that is not covered by the OMB emergency clearance approval.

Preliminary data from the survey will be available to SAMHSA and participating states monthly (pending sample size). The final dataset and analyses will be provided to SAMHSA and participating states in January 2012.

There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Individuals/telephone interviews	30,000	1	.5	15,000

Catina Conner,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–31980 Filed 12–20–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–11–11BJ]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 or send comments to Carol Walker, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS D–74, Atlanta, GA 30333 or send an e-mail to omb@cdc.gov.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

CDC Diabetes Prevention Recognition Program (DPRP)—New—Division of Diabetes Translation, National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Evidence from efficacy and effectiveness research studies has shown that lifestyle modifications leading to weight loss and increased physical activity can prevent or delay type 2 diabetes in individuals with

prediabetes or those at high risk of developing diabetes. To translate these research findings into practice, lifestyle programs that are effective and affordable need to be widely available and delivered on an ongoing basis.

The Centers for Disease Control and Prevention (CDC) is working to ensure that effective diabetes prevention programs are scalable, sustainable and affordable. To fulfill this mission, CDC is establishing the CDC Diabetes Prevention Recognition Program (DPRP) as an activity of the National Diabetes Prevention Program, housed in the Division of Diabetes Translation. The DPRP will provide a mechanism for recognizing organizations that deliver effective, community-based type 2 diabetes prevention programs. Information about program recognition status will be available to people at high risk of type 2 diabetes, their health care providers, and health payers. The Diabetes Prevention Recognition Program is authorized under section 399V–3 of Public Law 111–148, which directs CDC “to determine eligibility of entities to deliver community-based type 2 diabetes prevention services,” monitor and evaluate the services, and provide technical assistance.

Organizations may apply for recognition through the DPRP by completing a one-time, on-line

application form. To qualify, programs must meet the minimum eligibility requirements set forth in CDC's "DPRP Draft Recognition Standards and Operating Procedures." Criteria for recognition include, but are not limited to: (1) Following an evidence-based curriculum that has been proven effective in research and demonstration projects, and (2) submitting de-identified participant process and outcome data to CDC every six months. CDC will use the process and outcome data to monitor and evaluate program effectiveness and to provide targeted technical assistance to applicant organizations. Three levels of recognition will be provided: *Pending* recognition for new applicants that have submitted an application and meet

eligibility criteria defined by DPRP standards and operating procedures; *Full* recognition for programs that have demonstrated effectiveness according to DPRP standards; and *Probationary* recognition for programs that are working towards full attainment of the standards.

Each organization that seeks recognition through the DPRP will submit an initial, online application form to CDC. There is no application deadline. The de-identified process and outcome data necessary for assessing program performance will be submitted to CDC electronically twice per year. The due dates for these submissions will be determined by the date of the organization's initial application. CDC estimates that burden to respondents

will be modest since the information requested for DPRP recognition is routinely collected by organizations that deliver lifestyle programs. To further minimize burden to respondents, CDC will accept process and outcome data submitted using any electronic format, software or method that meets the requirements established by DPRP standards and operating procedures.

OMB approval is requested for three years. CDC anticipates seeking continued OMB approval throughout the lifetime of the DPRP. Respondents will be organizational entities that offer diabetes prevention services. Participation in the DPRP is voluntary, and there are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hr)	Total burden (in hr)
Applicants for Recognition through the DPRP.	Application Form	67	1	3/60	3
	Process and Outcome Data	67	2	5/60	11
Total .....	.....	.....	.....	.....	14

Thelma Sims,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010-31978 Filed 12-20-10; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Notice of Hearing: Reconsideration of Disapproval of California State Plan Amendments (SPAs) 08-009A; 08-009B1; 08-009B2; 08-009D; and 08-019

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice of hearing.

SUMMARY: This notice announces an administrative hearing to be held on February 10, 2011, at the CMS San Francisco Regional Office, 90 7th Street, #5-300 (5W), San Francisco, California 94103 to reconsider CMS' decision to disapprove California SPAs 08-009A; 08-009B1; 08-009B2; 08-009D; and 08-019.

CLOSING DATE: Requests to participate in the hearing as a party must be received by the presiding officer by January 5, 2011.

FOR FURTHER INFORMATION CONTACT:

Benjamin Cohen, Presiding Officer, CMS, 2520 Lord Baltimore Drive, Suite L, Baltimore, Maryland 21244. Telephone: (410) 786-3169.

SUPPLEMENTARY INFORMATION: This notice announces an administrative hearing to reconsider the decision of the Centers for Medicare & Medicaid Services (CMS) to disapprove California State plan amendments (SPAs) 08-009A; 08-009B1; 08-009B2; 08-009D; and 08-019 which were submitted on December 31, 2008, and disapproved on November 18, 2010. The SPAs proposed to reduce the reimbursement rates for certain services furnished under the approved State plan.

In the initial determination, CMS determined, after consulting with the Secretary, that it is unable to approve these SPAs because California has not demonstrated that it would meet the conditions set out in section 1902(a)(30)(A) of the Social Security Act (Act).

Section 1902(a)(30)(A) of the Act requires that State plans assure that "payments [to providers] * * * are sufficient to enlist enough providers so that care and services are available under the [State's Medicaid] plan [to recipients] at least to the extent that such care and services are available to

the general population in the geographic area."

When the SPAs were initially submitted, the State did not provide information concerning the impact of the proposed reimbursement reductions on beneficiary access to services, even though available national data indicate that this may be an issue for California. In the Requests for Additional Information (RAI) for SPAs TN 08-009A, TN 08-009B-1, TN 08-009D, (sent to the State in December 2008), and 08-019 (sent to the State in March, 2009), CMS requested information about beneficiary access to services, but California did not respond. As indicated in a January 2, 2001, letter to State Medicaid Directors, to the extent that responses to such RAIs are not received within 90 days, CMS may initiate disapproval action. In this instance, in addition, CMS had concerns that, given the time that has elapsed since these SPAs were submitted but not implemented, the cumulative effect of a retroactively effective approval of these reimbursement reductions would only serve to exacerbate beneficiary access concerns.

For these reasons, and after consulting with the Secretary as required by Federal regulations at 42 CFR 430.15(c)(2), these SPAs were disapproved.

The issues to be considered at the hearing are:

- Whether California has demonstrated that the proposed payments to providers were sufficient to enlist enough providers so that care and services were available under the State's Medicaid plan at least to the extent that such care and services are available to the general population in the geographic area as required by section 1902(a)(30)(A) of the Social Security Act.

- Whether the application of the payment rates under the SPAs retroactively, based on the proposed effective date, would be consistent with that requirement under section 1902(a)(30)(A) of the Act.

Section 1116 of the Act and Federal regulations at 42 CFR part 430, establish Department procedures that provide an administrative hearing for reconsideration of a disapproval of a State plan or plan amendment. CMS is required to publish a copy of the notice to a State Medicaid agency that informs the agency of the time and place of the hearing, and the issues to be considered. If we subsequently notify the agency of additional issues that will be considered at the hearing, we will also publish that notice.

Any individual or group that wants to participate in the hearing as a party must petition the presiding officer within 15 days after publication of this notice, in accordance with the requirements contained at 42 CFR 430.76(b)(2). Any interested person or organization that wants to participate as *amicus curiae* must petition the presiding officer before the hearing begins in accordance with the requirements contained at 42 CFR 430.76(c). If the hearing is later rescheduled, the presiding officer will notify all participants.

The notice to California announcing an administrative hearing to reconsider the disapproval of its SPAs reads as follows:

Mr. Toby Douglas, Chief Deputy
Director
Health Care Programs
Department of Health Care Services
1501 Capitol Avenue, 6th Floor
MS 0002
Sacramento, CA 95814

Dear Mr. Douglas:

I am responding to your request for reconsideration of the decision to disapprove the California State Plan Amendments (SPAs) 08-009A; 08-009B1; 08-009B2; 08-009D which were submitted on September 30, 2008, and 08-019 which was submitted on December 31, 2009, and disapproved on

November 18, 2010. The SPAs proposed to reduce the reimbursement rates for certain services furnished under the approved State plan.

The issues to be considered at the hearing are:

- Whether California has demonstrated that the SPAs assured that the proposed payments to providers would be sufficient to enlist enough providers so that care and services were available under the State's Medicaid plan at least to the extent that such care and services are available to the general population in the geographic area as required by section 1902(a)(30)(A) of the Social Security Act.

- Whether the application of the payment rates under the SPAs retroactively, based on the proposed effective date, would be consistent with that requirement under section 1902(a)(30)(A) of the Act.

In reviewing this issue, we note that, when the SPAs were initially submitted, the State did not provide any information concerning the impact of the proposed reimbursement reductions on beneficiary access to services, even though available national data indicated that this may be an issue for California.

In Requests for Additional Information (RAI) for SPAs TN 08-009A, TN 08-009B1, TN 08-009D (sent to the State in December 2008) and 08-019 (sent to the State in March 2009), CMS requested information about beneficiary access to services, but California never responded. As indicated in a January 2, 2001, letter to State Medicaid Directors, to the extent that responses to such RAIs are not received within 90 days, CMS may initiate disapproval action. In this instance, in addition, CMS was concerned that, given the time that had elapsed since these SPAs had been submitted but were not implemented, the cumulative effect of a retroactively effective approval of these reimbursement reductions exacerbate beneficiary access concerns.

I am scheduling a hearing on your request for reconsideration to be held on February 10, 2011, at the CMS San Francisco Regional Office, 90 7th Street, #5-300 (5W), San Francisco, California 94103-6706, in order to reconsider the decision to disapprove SPAs 08-009A; 08-009B1; 08-009B2; 08-009D; and 08-019. If this date is not acceptable, we would be glad to set another date that is mutually agreeable to the parties. The hearing will be governed by the procedures prescribed by Federal regulations at 42 CFR Part 430.

I am designating Mr. Benjamin Cohen as the presiding officer. If these arrangements are not acceptable, please

contact the presiding officer at (410) 786-3169. To facilitate any communication which may be necessary between the parties to the hearing, please notify the presiding officer to indicate acceptability of the hearing date that has been scheduled, and to provide names of the individuals who will represent the State at the hearing. Sincerely,

Donald M. Berwick, M.D.
Section 1116 of the Social Security Act
(42 U.S.C. section 1316; 42 CFR section 430.18)

(Catalog of Federal Domestic Assistance program No. 13.714, Medicaid Assistance Program.)

Dated: December 15, 2010.

Donald M. Berwick,
Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2010-32007 Filed 12-20-10; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2010-N-0001]

Advisory Committees; Tentative Schedule of Meetings for 2011

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a tentative schedule of forthcoming meetings of its public advisory committees for 2011. During 1991, at the request of the Commissioner of Food and Drugs (the Commissioner), the Institute of Medicine (the IOM) conducted a study of the use of FDA's advisory committees. In its final report, one of the IOM's recommendations was for the Agency to publish an annual tentative schedule of its meetings in the **Federal Register**. This publication implements the IOM's recommendation.

FOR FURTHER INFORMATION CONTACT:

Teresa L. Hays, Advisory Committee Oversight and Management Staff (HF-4), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5290, Silver Spring, MD 20993-0002, 301-796-8220.

SUPPLEMENTARY INFORMATION: The IOM, at the request of the Commissioner, undertook a study of the use of FDA's advisory committees. In its final report in 1992, one of the IOM's recommendations was for FDA to adopt a policy of publishing an advance yearly schedule of its upcoming public

advisory committee meetings in the **Federal Register**; FDA has implemented this recommendation. The annual publication of tentatively scheduled advisory committee meetings will provide both advisory committee members and the public with the opportunity, in advance, to schedule attendance at FDA's upcoming advisory

committee meetings. Because the schedule is tentative, amendments to this notice will not be published in the **Federal Register**. However, changes to the schedule will be posted on the FDA advisory committees' Internet site located at <http://www.fda.gov/AdvisoryCommittees/default.htm>. FDA will continue to publish a **Federal**

Register notice 15 days in advance of each upcoming advisory committee meeting, to announce the meeting (21 CFR 14.20).

The following list announces FDA's tentatively scheduled advisory committee meetings for 2011.

TABLE 1

Committee name	Tentative date(s) of meeting(s)
OFFICE OF THE COMMISSIONER	
Pediatric Advisory Committee	March 21, June 21–22, December 5–6.
Risk Communication Advisory Committee	February 10–11, May 5–6, August 15–16, November 17–18.
Science Board to the Food and Drug Administration	February 25, May 20, August 19, November 10.
CENTER FOR BIOLOGICS EVALUATION AND RESEARCH	
Allergenic Products Advisory Committee	May 12.
Blood Products Advisory Committee	April 28–29, August 3–4, December 1–2.
Cellular, Tissue and Gene Therapies Advisory Committee	February 10, September 22–23.
Transmissible Spongiform Encephalopathies Advisory Committee	Date(s), if needed, to be determined.
Vaccines and Related Biological Products Advisory Committee	February 24–25, May 18–19, September 20–21, November 16–17.
CENTER FOR DRUG EVALUATION AND RESEARCH	
Anesthetic and Life Support Drugs Advisory Committee	March 10.
Anti-Infective Drugs Advisory Committee	April date(s), if needed, to be determined.
Antiviral Drugs Advisory Committee	April 27–29.
Arthritis Advisory Committee	March 15–16, May 3.
Cardiovascular and Renal Drugs Advisory Committee	March 31, April 1, July 26–27, October 20–21, December 13–14.
Dermatologic and Ophthalmic Drugs Advisory Committee	April 13.
Drug Safety and Risk Management Advisory Committee	Date(s), if needed, to be determined.
Endocrinologic and Metabolic Drugs Advisory Committee	March 24.
Gastrointestinal Drugs Advisory Committee	January 12, March 8, May date(s), if needed, to be determined.
Nonprescription Drugs Advisory Committee	February 23–24.
Oncologic Drugs Advisory Committee	February 8–9, March 29–30, June 28–29, July 13–14, September 14–15, December 7–8.
Peripheral and Central Nervous System Drugs Advisory Committee	January 20–21, March 10.
Advisory Committee for Pharmaceutical Science and Clinical Pharmacology.	March 2.
Psychopharmacologic Drugs Advisory Committee	Date(s), if needed, to be determined.
Pulmonary-Allergy Drugs Advisory Committee	March 8.
Advisory Committee for Reproductive Health Drugs	March 4, April and May date(s), if needed, to be determined.
CENTER FOR DEVICES AND RADIOLOGICAL HEALTH	
Medical Devices Advisory Committee (Comprised of 18 Panels)	
Anesthesiology and Respiratory Therapy Devices Panel	April 15.
Circulatory System Devices Panel	January 25–26, February 24–25, March 24–25, April 28–29, December 8–9.
Clinical Chemistry and Clinical Toxicology Devices Panel	November 9.
Dental Products Panel	April 12–13, September 8–9.
Ear, Nose, and Throat Devices Panel	September 28–29.
Gastroenterology-Urology Devices Panel	January 20–21, April 21–22, July 14–15, October 27–28.
General and Plastic Surgery Devices Panel	February 24–25, May 12–13, August 11–12, November 17–18.
General Hospital and Personal Use Devices Panel	July 29.
Hematology and Pathology Devices Panel	March 24–25, June 9–10, September 15–16, December 15–16.
Immunology Devices Panel	March 31, June 30, September 29, December 1.
Medical Devices Dispute Resolution Panel	April 8.
Microbiology Devices Panel	October 13.
Molecular and Clinical Genetics Panel	March 3–4.
Neurological Devices Panel	January 27–28, March 17.
Obstetrics and Gynecology Devices Panel	May 19–20, September 22–23.
Ophthalmic Devices Panel	February 18.
Orthopedic and Rehabilitation Devices Panel	April 26–27, July 8.
Radiological Devices Panel	June 17, October 27–28.
National Mammography Quality Assurance Advisory Committee	May 6, August 9.
Technical Electronic Product Radiation Safety Standards Committee	May 25.

TABLE 1—Continued

Committee name	Tentative date(s) of meeting(s)
CENTER FOR FOOD SAFETY AND APPLIED NUTRITION	
Food Advisory Committee	March 30–31.
CENTER FOR TOBACCO PRODUCTS	
Tobacco Products Scientific Advisory Committee	January 10–11, March 17–18, May, July, September, and November date(s), if needed, to be determined.
CENTER FOR VETERINARY MEDICINE	
Veterinary Medicine Advisory Committee	April 11, September 12.
NATIONAL CENTER FOR TOXICOLOGICAL RESEARCH	
Science Advisory Board	November 9–10.

Dated: December 16, 2010.

Jill Hartzler Warner,
Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2010–31961 Filed 12–20–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0626]

Abbott Laboratories, Inc.; Withdrawal of Approval of a New Drug Application for MERIDIA

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of a new drug application (NDA) for MERIDIA (sibutramine hydrochloride (HCl)) oral capsules held by Abbott Laboratories, Inc. (Abbott), 100 Abbott Park Rd., Abbott Park, IL 60064. Abbott has voluntarily requested that approval of this application be withdrawn, thereby waiving its opportunity for a hearing.

DATES: Effective December 21, 2010.

FOR FURTHER INFORMATION CONTACT: Nicole Mueller, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6312, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: On October 7, 2010, FDA requested that Abbott voluntarily withdraw MERIDIA (sibutramine HCl) oral capsules from the market, based on FDA's recent analysis of clinical trial data from the Sibutramine Cardiovascular Outcomes

Trial (SCOUT) that indicated that MERIDIA poses an increased risk of heart attack and stroke. In a letter dated October 12, 2010, Abbott requested that FDA withdraw approval of NDA 20–632 for MERIDIA (sibutramine HCl) oral capsules under § 314.150(d) (21 CFR 314.150(d)). In that letter, Abbott also waived its opportunity for a hearing, provided under § 314.150(a). In FDA's acknowledgment letter of November 1, 2010, the agency stated that based on the review of the SCOUT data and the assessment of the September 15, 2010, meeting of FDA's Endocrinologic and Metabolic Drugs Advisory Committee at which the SCOUT data were reviewed, we find the benefits of MERIDIA (sibutramine HCl) oral capsules, indicated for the management of obesity, including weight loss and maintenance of weight loss, no longer outweigh the risks in any identifiable patient population. FDA also acknowledged that Abbott waived its opportunity for a hearing.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(e)), § 314.150(d), and under authority delegated by the Commissioner of Food and Drugs to the Director, Center for Drug Evaluation and Research, approval of NDA 20–632, and all amendments and supplements thereto, is withdrawn (see **DATES**). Distribution of this product in interstate commerce without an approved application is illegal and subject to regulatory action (see sections 505(a) and 301(d) of the FD&C Act (21 U.S.C. 355(a) and 331(d)).

Dated: December 6, 2010.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 2010–31986 Filed 12–20–10; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, Unsolicited Multi-Project (P01) Grant Applications.

Date: January 12, 2011.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817. (Telephone Conference Call.)

Contact Person: Roberta Binder, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, Room 3130, Bethesda, MD 20892–7616. 301–496–7966. rbinder@niaid.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010-32025 Filed 12-20-10; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Novel Therapies for NIDDM P01 Application.

Date: January 27, 2011.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: D.G. Patel, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892-5452. (301) 594-7682. pateldg@nidk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Ancillary Studies to major ongoing Clinical Research Studies in CKD (R01): PAR-09-247.

Date: February 1, 2011.

Time: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Najma Begum, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 749, 6707 Democracy Boulevard, Bethesda, MD 20892-5452. (301) 594-8894. begumn@nidk.nih.gov.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases

Special Emphasis Panel, R14 Seeding Application.

Date: February 18, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: D.G. Patel, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 756, 6707 Democracy Boulevard, Bethesda, MD 20892-5452. (301) 594-7682. pateldg@nidk.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010-32026 Filed 12-20-10; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Research Resources Special Emphasis Panel; Biotechnology 2011.

Date: February 23-24, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Lee Warren Slice, PhD, Scientific Review Officer, Office of Review, National Center for Research Resources, 6701 Democracy Blvd., Room 1068, Bethesda, MD 20892, 301-435-0965.

Name of Committee: National Center for Research Resources Special Emphasis Panel.

Date: February 23, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Lisa A. Newman, SCD, Scientific Review Officer, National Institutes of Health, National Center for Research Resources, Office of Review, Room 1074, 6701 Democracy Blvd., MSC 4874, Bethesda, MD 20892, 301-435-0965, newmanla2@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010-32024 Filed 12-20-10; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Virus Infection Analysis.

Date: January 11, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Eleazar Cohen, PhD, Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, Room 3129, 6700 B Rockledge Drive, Bethesda, MD 20892. 301-435-3564. ec17w@nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856,

Microbiology and Infectious Diseases
Research, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 2010-32023 Filed 12-20-10; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Research Resources Initial Review Group. Comparative Medicine Review Committee.

Date: February 16–17, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Bonnie B. Dunn, PhD, Scientific Review Officer, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., 1 Democracy Plaza, Room 1074, Msc 4874, Bethesda, MD 20892-4874. 301-435-0824. dunnbo@mail.nih.gov.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 2010-32021 Filed 12-20-10; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Research Resources; Notice of Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of meetings of the National Advisory Research Resources Council.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Research Resources Council.

Date: January 25, 2011.

Open: 8 a.m. to 11:30 a.m.

Agenda: Report from the Institute Director and other Institute business.

Place: National Institutes of Health, Building 31, 6th Floor, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Closed: 12:30 p.m. to adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 6th Floor, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Louise E. Ramm, PhD, Deputy Director, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., Room 902, Bethesda, MD 20892. 301-435-0879. louiser@ncrr.nih.gov.

Name of Committee: National Advisory Research Resources Council.

Date: May 17, 2011.

Open: 8 a.m. to 11:30 a.m.

Agenda: Report from the Institute Director and other Institute business.

Place: National Institutes of Health, Building 31, 6th Floor, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Closed: 12:30 p.m. to adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 6th Floor, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Louise E. Ramm, PhD, Deputy Director, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., Room 902, Bethesda, MD 20892. 301-435-0879. louiser@ncrr.nih.gov.

Name of Committee: National Advisory Research Resources Council.

Date: September 13, 2011.

Open: 8 a.m. to 11:30 a.m.

Agenda: Report from the Institute Director and other Institute business.

Place: National Institutes of Health, Building 31, 6th Floor, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Closed: 12:30 p.m. to adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 6th Floor, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Louise E. Ramm, PhD, Deputy Director, National Center for Research Resources, National Institutes of Health, 6701 Democracy Blvd., Room 902, Bethesda, MD 20892. 301-435-0879. louiser@ncrr.nih.gov.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: <http://www.ncrr.nih.gov/newspub/minutes.htm>, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.371, Biomedical Technology; 93.389, Research Infrastructure, 93.306, 93.333; 93.702, ARRA Related Construction Awards, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 2010-32020 Filed 12-20-10; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG-2010-1050]

National Offshore Safety Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of teleconference meeting.

SUMMARY: The National Offshore Safety Advisory Committee (NOSAC) will meet by teleconference to discuss items related to safety of operations and other matters affecting the oil and gas offshore industry. The purpose of this meeting is to review and discuss reports and recommendations received from the two NOSAC subcommittees and to address two new tasks for the Committee. This meeting will be open to the public.

DATES: The teleconference meeting will take place on Wednesday, January 12, 2011, from 11 a.m. to 12:30 p.m. EST. This meeting may close early if all business is finished.

ADDRESSES: The Committee will meet via telephone conference, on January 12, 2011. Public participation is welcome and members of the public wishing to participate may contact Commander P.W. Clark at 202-372-1410, for call-in information, or they may participate in person by coming to Room 5-0622, U.S. Coast Guard Headquarters Building, 2100 Second Street, SW., Washington, DC 20593. As there are a limited number of teleconference lines, public participation will be on a first come basis. Written material and requests to make oral presentations should be sent to Commander P.W. Clark, Designated Federal Officer of NOSAC, Commandant (CG-5224), 2100 Second Street, SW., Stop 7126, Washington, DC 20593-001 or by fax to 202-372-1926 on or before January 3, 2011. Requests to have a copy of your material distributed to each member of the committee should reach the Coast Guard on or before January 3, 2011. This notice and supporting documentation is available in our online docket, USCG-2010-1050, at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Commander P.W. Clark, Designated Federal Officer (DFO) of NOSAC, or Mr. Kevin Pekarek, Assistant Designated Federal Officer (ADFO), telephone 202-372-1386, fax 202-372-1926.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Pub. L. 92-463). NOSAC provides advice and makes

recommendations to the Coast Guard on safety and other concerns affecting the offshore oil and gas industry and assists the Coast Guard in formulating U.S. positions for discussion and presentation at the International Maritime Organization (IMO).

Agenda of Meeting

The agenda for the January 12, 2011, Committee meeting is as follows:

(1) Roll call of committee members and the public participating in the teleconference.

(2) Approval of minutes from the November 9, 2010, meeting.

(3) Presentation and discussion of interim reports and recommendations on:

(a) Medical Evacuation of Injured Divers

(b) Marine Portable Quarters

(4) Review and discuss a task statement which requests the Committee review the recommendations from the Mississippi Canyon Block 52 marine casualty investigation and provide safety and environmental improvement recommendations with respect to Coast Guard regulations and policies as appropriate.

(5) Review and discuss a task statement that requests NOSAC review their previous report on recommendations for standards for Offshore Supply Vessels with a gross registered tonnage greater than 6000 GRT in light of the recently passed Coast Guard Authorization Act and determine if the recommendations are complete or if additional recommendations should be provided to the Coast Guard for use in the development of regulations for large OSVs.

(6) Discussion of nominations for Committee Chair and Vice Chair.

(7) Period for public comment.

Procedural

The DFO will use the following procedures to facilitate the meeting.

(1) This meeting is open to the public. Please note that the meeting may close early if all business is finished.

(2) Members of the public may make oral presentations during the meeting concerning the matters being discussed. If you would like to make an oral presentation during the teleconference, please notify the DFO listed in the **FOR FURTHER INFORMATION CONTACT** section above, no later than January 3, 2011. Written material for distribution to Committee members should reach the Coast Guard no later than January 3, 2011.

(3) An individual, whether speaking in a personal or a representative

capacity on behalf of an organization, will be limited to a three-minute statement and scheduled on a first-come, first-served basis. If a large number of persons register to present comments, this amount of time may be shortened to provide all registered persons an opportunity to present their comments

Minutes

Minutes from the meeting will be available for public review and copying 30 days following the meeting at the <http://www.fido.gov> Web site. The meeting minutes may be accessed via this Web site by using the Committee Search function and searching for the Committee by name or by using the Committee number of "68". Once you have accessed the Committee page, click on the meetings tab and then the "View" button for the meeting dated Jan 12, 2011 to access the information for this meeting.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Mr. Kevin Pekarek at 202-372-1386 as soon as possible.

Dated: December 15, 2010.

J.G. Lantz,

Director of Commercial Regulations and Standards.

[FR Doc. 2010-31946 Filed 12-20-10; 8:45 am]

BILLING CODE 9110-04-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5376-N-124]

Notice of Submission of Proposed Information Collection to OMB; Emergency Comment Request; Indian Housing Block Grants (IHBG) Program Reporting; Notice of Proposed Information Collection for Public Comment

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice of proposed information collection.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for emergency review and approval, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* January 4, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments must be received within fourteen (14) days from the date of this Notice. Comments should refer to the proposal by name/or OMB approval number (2577-0218)) and should be sent to: Ross A. Rutledge, HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; *e-mail:* Ross.A.Rutledge@omb.eop.gov; *Fax:* 202-395-3086.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Departmental Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; *e-mail* Colette.Pollard@HUD.gov; telephone (202) 402-3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This request for emergency processing is essential in order to implement the statutory changes to NAHASDA for fiscal year 2012. A standard PRA review would delay implementation of the revised IHP/APR until fiscal year 2013. The agency cannot reasonably comply with the normal clearance procedures under this part because the statutory changes accelerate the submission of the IHP. With implementation of the statutory changes, the IHP is due 75 days prior to the beginning of the grantee's fiscal year. For grantees with a fiscal year beginning October 1, 2011, the revised IHP will be due July 16, 2011, rather than July 1, 2012. The emergency clearance processing of the revised PRA is needed in order to provide IHBG recipients with sufficient time to complete the IHP prior to submission and provide training to all IHBG recipients on the revised form. Therefore, the use of the normal clearance procedures is reasonably likely to prevent or disrupt the collection of information and is reasonably likely to cause a statutory deadline to be missed.

This Notice also lists the following information:

Title of Proposal: Indian Housing Block Grants (IHBG) Program Reporting.

Description of Information Collection: Recipients of Indian Housing Block Grant (IHBG) funds provide plans for low-income housing programs in their communities and submit quarterly reports on funds drawn. Recipients may submit information to correct and/or challenge data used in annual housing assistance formula allocations.

Additional requirements have been added: Recipients may purchase insurance from a nonprofit insurance entity approved by HUD. These entities must submit annual audit and actuarial reviews to HUD annually.

OMB Control Number: 2577-0218.

Agency Form Numbers: Form 52735 and 52735-AS Combined, HUD-272-I, HUD-4117, HUD-4119.

Members of Affected Public: State, Local, and Tribal.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of responses, and hours of response: An estimation of the total number of hours needed to prepare the information collection is 366, the estimated number of respondents is 144, the frequency response is one time, and the estimated number of hours per response is 366.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: December 14, 2010.

Colette Pollard,

*Departmental Reports Management Officer,
Office of the Chief Information Officer.*

[FR Doc. 2010-31929 Filed 12-20-10; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5380-N-52]

Notice of Proposed Information Collection: Comment Request; Continuation of Interest Reduction Payments After Refinancing Section 236 Projects

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 22, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; *e-mail*

Colette.Pollard@hud.gov or telephone (202) 402-3400.

FOR FURTHER INFORMATION CONTACT:

Kimberly R. Munson, Housing Program Manager, Office of Asset Management, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708-1320 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Continuation of Interest Reduction Payments after Refinancing Section 236 Projects.

OMB Control Number, if applicable: 2502-0572.

Description of the need for the information and proposed use: The purpose of this information collection is to preserve low-income housing units. HUD uses the information to ensure that owners and mortgagees/public entities enter into binding agreements for continuation of Interest Reduction Payments (IRP) after refinancing certain Section 236 projects.

Agency form numbers, if applicable: None.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is estimated to be 96. The number of respondents is 48, the frequency of response is based on the owner's request to refinance (requests in the current calendar year are 48), the number of expected responses is 48, and the burden hour per response is 0.50.

Status of the proposed information collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: December 16, 2010.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing.

[FR Doc. 2010-32012 Filed 12-20-10; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5380-N-50]

Quality Control Requirements for Direct Endorsement Lenders; Notice of Proposed Information Collection: Comment Request

AGENCY: Office of the Assistant Secretary for Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: February 22, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1-800-877-8339).

FOR FURTHER INFORMATION CONTACT: Tom Cook, Housing Program Policy Specialist, Single Family Housing, Office of Lender Activities and Program Compliance, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410, telephone (202) 708-2830 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is

necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Quality Control Requirements for Direct Endorsement Lenders.

OMB Control Number, if applicable: 2502-NEW.

Description of the need for the information and proposed use: As of January 1, 2011, mortgagees that were previously approved as loan correspondents will be able to participate as Third Party Originators (TPOs) in FHA-insured mortgage transactions only if the conditions outlined in 24 CFR 202.8 are met. Per 24 CFR 202.8 (3) DE lenders which sponsor TPOs are responsible to the Secretary for the actions of third party originators or mortgagees in originating loans or mortgages, unless applicable law or regulation requires specific knowledge on the part of the party to be held responsible. As a result, DE lenders will be responsible for conducting quality control on TPO originations of FHA-insured mortgage loans, and ensuring that their QC plan is expanded to contain this oversight provision. This will create an additional information collection burden on DE lenders, since these institutions must also conduct quality control on all loans they originate and underwrite.

Agency form numbers, if applicable: Not applicable.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 91,515. The number of respondents is 1,853, the number of responses is 169,158, the frequency of response is annually, and the burden hour per response is 1.5.

Status of the proposed information collection: This is a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: December 16, 2010.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing.

[FR Doc. 2010-32015 Filed 12-20-10; 8:45 am]

BILLING CODE 4210-67-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5380-N-51]

Technical Suitability of Products Program Section 521 of the National Housing Act; Notice of Proposed Information Collection: Comment Request

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* February 22, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Colette Pollard, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street, SW., Washington, DC 20410; e-mail Colette.Pollard@hud.gov or telephone (202) 402-3400.

FOR FURTHER INFORMATION CONTACT: Geraldine Uju Aguolu, General Engineer, Office of Manufactured Housing Programs, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708-2698 x 5599 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have

practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Technical Suitability of Products Program Section 521 of the National Housing Act.

OMB Control Number, if applicable: 2502-0313.

Description of the need for the information and proposed use: This information is needed under HUD's Technical Suitability of Products Program to determine the acceptance of materials and products to be used in structures approved for mortgages insured under the National Housing Act.

Agency form numbers, if applicable: HUD 92005.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated number of burden hours needed to prepare the information collection is 2,220; the number of respondents is 50 generating approximately 50 annual responses; the frequency of response is on occasion; and the estimated time needed to prepare the response is 44 hours.

Status of the proposed information collection: Request for extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: December 16, 2010.

Ronald Y. Spraker,

Associate General Deputy Assistant Secretary for Housing.

[FR Doc. 2010-32014 Filed 12-20-10; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Renewal of Agency Information Collection for Application for Job Placement and Training Services; Request for Comments

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Indian Energy & Economic Development (IEED) is seeking comments on renewal of the Office of Management and Budget (OMB) approval for the collection of information for the Application for Job Placement and Training Services. The information collection is currently authorized by OMB Control Number 1076-0062, which expires on March 31, 2010.

DATES: Interested persons are invited to submit comments on or before February 22, 2011.

ADDRESSES: You may submit comments on the information collection to Lynn Forcia, Chief, Division of Workforce Development, Office of Indian Energy and Economic Development, 1951 Constitution Avenue, NW., Mail Stop SIB/20, Washington, DC 20240, e-mail Lynn.Forcia@bia.gov.

FOR FURTHER INFORMATION CONTACT:

Lynn Forcia, Chief, Division of Workforce Development at (202) 219-5270.

SUPPLEMENTARY INFORMATION:

I. Abstract

The IEED is seeking renewal of the approval for the information collection conducted under 25 CFR part 26 to administer the job placement and training program, which provides vocational/technical training, related counseling, guidance, job placement services, and limited financial assistance to Indian individuals who are not less than 18 years old and who reside within the Department of the Interior (DOI) approved service areas. This information collection includes a form: BIA-8205, Application for Job Placement and/or Training Assistance. Approval for this collection expires March 31, 2010.

This renewal will adjust the responses and burden hours that are currently approved to correct for a database entry error that occurred in the last submission that quadrupled the number of responses and burden hours. The 60-day notice and 30-day notice for the current approval reflected the current number of responses and burden hours, as does this notice. The database will be corrected to reflect these figures through a change due to adjustment in agency estimate.

II. Request for Comments

The IEED requests that you send your comments on this collection to the location listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of the information collection

for the proper performance of the agencies, including whether the information will have practical utility; (b) the accuracy of our estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or conduct, an individual need not respond to, a collection of information unless it has a valid OMB Control Number. This information collection expires March 31, 2010.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section during the hours of 9 a.m. and 5 p.m., Eastern Time, Monday through Friday except for legal holidays. Before including your address, phone number, e-mail address or other personally identifiable information, be advised that your entire comment—including your personally identifiable information—may be made public at any time. While you may request that we withhold your personally identifiable information, we cannot guarantee that we will be able to do so.

III. Data

OMB Control Number: 1076-0062.

Title: Application for Job Placement & Training Services.

Brief Description of Collection: Submission of this information allows DOI to administer the job placement and training program, which provides vocational/technical training, related counseling, guidance, job placement services, and limited financial assistance to Indian individuals who are not less than 18 years old and who reside within DOI approved service areas. The information collection includes an application for services, progress reports, and on-the-job training reports. Response is required to obtain a benefit.

Type of Review: Extension without change of a currently approved collection.

Respondents: Individuals seeking to participate, or currently participating, in the IEED job placement and training program.

Number of Respondents: 4,900 per year, on average.

Total Number of Responses: 4,900 per year, on average.

Frequency of Response: Once annually.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden: 2,451 hours.

Dated: December 14, 2010.

Alvin Foster,

Acting Chief Information Officer—Indian Affairs.

[FR Doc. 2010-31982 Filed 12-20-10; 8:45 am]

BILLING CODE 4310-4J-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L61400000.ER00000.LLOR936000; OMB Control Number 1004-0168]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management.

ACTION: 30-day Notice and Request for Comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) for a 3-year extension of OMB Control Number 1004-0168 under the Paperwork Reduction Act. This control number includes paperwork requirements in regulations that provide for the management of tramroads and logging roads over public lands administered by the BLM in western Oregon, including the Revested Oregon and California (O. and C.) Railroad Grant Lands and Reconveyed Coos Bay Wagon Road (CBWR) lands.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. Therefore, written comments should be received on or before January 20, 2011 in order to be assured of consideration.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004-0168), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202-395-5806, or by electronic mail at oir_docket@omb.eop.gov. Please provide a copy of your comments to the BLM via mail, fax, or electronic mail.

Mail: Bureau Information Collection Clearance Officer (WO-630), Department of the Interior, 1849 C Street, NW., Mail Stop 401 LS, Washington, DC 20240.

Fax: Jean Sonneman at 202-912-7102.

Electronic mail: jean_sonneman@blm.gov.

FOR FURTHER INFORMATION CONTACT: You may contact Sarah Bickford at 541-471-6694. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) on 1-800-877-8339. You may also contact Ms. Bickford to obtain a copy, at no cost, of the regulations and forms that require this collection of information.

SUPPLEMENTARY INFORMATION: The following information is provided for the information collection:

Title: Tramroads and Logging Roads (43 CFR part 2810).

Form: Form OR 2812-6, Report of Road Use.

OMB Number: 1004-0168.

Type of Review: Extension of a currently approved information collection.

Abstract: This collection of information pertains to the management of tramroads and logging roads over public lands administered by the BLM, including the Revested O. and C. Railroad Grant Lands and Reconveyed CBWR lands. On these lands in western Oregon, the BLM Oregon State Office has authority under the Act of August 28, 1937 (43 U.S.C. 1181a and 1181b) and Subchapter V of the Federal Land Policy and Management Act (43 U.S.C. 1761-1771) to grant rights-of-way to private landowners to transport their timber over BLM-controlled roads. These rights-of-way are in the form of permits or reciprocal right-of-way agreements.

Each right-of-way permit or agreement requires the holder to provide the BLM with a certified statement, on Form OR 2812-6 (Report of Road Use), disclosing the amount of timber removed, the lands from which the timber was removed, and the BLM roads used to transport the timber. The BLM uses the information to determine the amount of charges for such use. Responses are mandatory.

Frequency of Collection: On occasion for all aspects of this information collection.

Annual Burden Hours: 272 responses with 8 hours per response totals 2,176 burden hours.

Annual Non-hour Burden Cost: There are no processing fees associated with this collection.

Comments: As required in 5 CFR 1320.8(d), the BLM published the 60-day notice in the **Federal Register** on June 16, 2010 (75 FR 34150) soliciting comments from the public and other interested parties. The comment period closed on August 16, 2010. The BLM did not receive any comments from the public in response to this notice, and

did not receive any unsolicited comments.

The BLM now requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments to the addresses listed under **ADDRESSES**. Please refer to OMB Control Number 1004-0168 in your correspondence. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Jean Sonneman,

Acting Information Collection Clearance Officer.

[FR Doc. 2010-31968 Filed 12-20-10; 8:45 am]

BILLING CODE 4310-84-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA 49834; L51010000.ER0000 LLCAD09000 LVRWB09B3160]

Notice of Availability of the Final Environmental Impact Report/Final Environmental Impact Statement for the Southern California Edison Eldorado-Ivanpah Transmission Project, California and Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, as amended, the Federal Land Policy and Management Act of 1976 (FLPMA), and the California Environmental Quality Act of 1970, the Department of the Interior, Bureau of Land Management (BLM) and the

California Public Utilities Commission (CPUC) have prepared a Final Environmental Impact Report (EIR)/ Final Environmental Impact Statement (EIS) for the proposed Eldorado-Ivanpah Transmission Project (EITP), Clark County, Nevada, and San Bernardino County, California, and by this notice are announcing its availability.

DATES: The BLM will not issue a Record of Decision based on the EITP Final EIR/ EIS until 30 days after the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**.

ADDRESSES: Copies of the EITP Final EIR/EIS are available at the Needles Field Office, 1303 South U.S. Highway 95, Needles, California 92363; on the Internet at: <http://www.blm.gov/ca/st/en/fo/needles.html>; and at the BLM California State Office, 2800 Cottage Way, Sacramento, California 95825. Electronic (CD-ROM) or paper copies may also be obtained by contacting George Meckfessel at (760) 326-7000 or by e-mailing your request to caeitp@blm.gov. Please include your name and mailing address.

FOR FURTHER INFORMATION CONTACT: For further information and/or to have your name added to our mailing list, contact Tom Hurshman, Project Manager, address: 2465 South Townsend Avenue, Montrose, Colorado 81401; *phone:* (970) 240-5345; *fax:* (970) 240-5368, or *e-mail:* Tom_Hurshman@blm.gov.

SUPPLEMENTARY INFORMATION: The BLM's purpose and need for the EITP is to respond to Southern California Edison's (SCE) application under Title V of the FLPMA (43 USC 1761) for authorization of a right-of-way (ROW) on BLM-managed lands to upgrade and replace an existing 115-kilovolt (kV) transmission line on public lands with a new double circuit 230-kV transmission line in compliance with FLPMA, BLM's ROW regulations, and other applicable Federal laws. The upgraded transmission line would extend approximately 35 miles from southern Clark County, Nevada (28 miles), into northeastern San Bernardino County, California (7 miles). The project would also include a new Ivanpah substation in California near Primm, Nevada, which would serve as a connector hub for solar energy generated in the Ivanpah Valley area. The existing Eldorado Substation would be modified to accommodate the new EITP. The segment of transmission line to be replaced is approximately 36 miles long and originates at the existing Eldorado Substation in T. 25 S., R. 62 E., Sec. 1, Mount Diablo Meridian, and terminates at the proposed Ivanpah

Substation in T. 16 N., R. 14 E., Sec. 4, San Bernardino Meridian.

The BLM will decide whether to approve, approve with modification, or deny issuance of a ROW authorization to SCE for the proposed EITP. The EITP would carry electricity from several renewable energy projects proposed in and around the Ivanpah Valley, including the Ivanpah Solar Energy Generation System currently under construction by BrightSource Energy Partners. The proposed transmission line and new substation would be constructed within an existing designated utility corridor. Telecommunications lines are also proposed. The public lands in the project area are managed by the BLM in accordance with the California Desert Conservation Area Plan and the Las Vegas Field Office Resource Management Plan.

The BLM will consider approval of the EITP in a manner that avoids or reduces impacts to public lands. This action is consistent with Federal law and the Department of the Interior's policy to facilitate and encourage the development of renewable energy resources on the public lands pursuant to Title V of FLPMA and Section 211 of the Energy Policy Act of 2005 (119 Stat. 594, 660).

In addition to the proposed action and the no action alternatives, the Final EIR/ EIS analyzes six additional action alternatives that address alternative routes for the transmission and telecommunications lines. As proposed, the transmission line has been sited to take advantage of existing designated ROW corridors which are areas identified by BLM land use plans as suitable for ROW development.

A Notice of Intent to prepare an EIR/ EIS for the EITP was published in the **Federal Register** on July 27, 2009 (74 FR 37053) followed by a 30-day public scoping period. A Notice of Availability for the Draft EIR/EIS was published in the **Federal Register** on May 7, 2010 (75 FR 25288) followed by a 45-day public comment period. The BLM and the CPUC conducted one public meeting during the comment period on the Draft EIR/EIS. Major comments addressed in this Final EIR/EIS concern project impacts on biological resources, compatibility with the proposed Southern Nevada Supplemental Airport, consistency with existing BLM land use plans, and cumulative impacts.

Authority: 40 CFR 1506.6, 1506.10, and 43 CFR 1610.2.

Thomas Pogacnik,
Deputy State Director.

[FR Doc. 2010-31970 Filed 12-17-10; 8:45 am]

BILLING CODE 4310-40-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLES956000-L14200000-BJ0000-LXSITRST0000]

Eastern States: Filing of Plat of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plat of Survey; Alabama.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM-Eastern States office in Springfield, Virginia, 30 calendar days from the date of publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management-Eastern States, 7450 Boston Boulevard, Springfield, Virginia 22153. Attn: Cadastral Survey.

SUPPLEMENTARY INFORMATION: The survey was requested by the Bureau of Indian Affairs.

The lands surveyed are:

St. Stephens Meridian, Alabama
T. 17 N., R. 19 E.

The plat of survey represents the dependent resurvey of Parcel No. 17, land held in trust for the Poarch Band of the Creek Indians, in Township 17 North, Range 19 East, of the St. Stephens Meridian, in the State of Alabama, and was accepted September 28, 2010.

We will place a copy of the plat we described in the open files. It will be available to the public as a matter of information.

If BLM receives a protest against the survey, as shown on the plat, prior to the date of the official filing, we will stay the filing pending our consideration of the protest.

We will not officially file the plat until the day after we have accepted or dismissed all protests and they have become final, including decisions on appeals.

Dated: December 14, 2010.

Dominica Van Koten,
Chief Cadastral Surveyor.

[FR Doc. 2010-31984 Filed 12-20-10; 8:45 am]

BILLING CODE 4310-GJ-P

DEPARTMENT OF THE INTERIOR**Bureau of Land Management****[LLCON06000-L17110000-XX0000]****Notice of Resource Advisory Council Meeting for the Dominguez-Escalante Advisory Council****AGENCY:** Bureau of Land Management, Interior.**ACTION:** Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act of 1976 and the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, Bureau of Land Management (BLM) Dominguez-Escalante Advisory Council (Council) will meet as indicated below.

DATES: The meeting will be held on January 5, 2011, from 1 p.m. to 5 p.m.

ADDRESSES: Bill Heddles Recreation Center, 530 Gunnison River Drive, Delta, CO 81416.

FOR FURTHER INFORMATION CONTACT: Katie Stevens, Advisory Council Designated Federal Official, 2815 H Road, Grand Junction, CO 81506. *Phone:* (970) 244-3049. *E-mail:* kasteven@blm.gov.

SUPPLEMENTARY INFORMATION: The 10-member Council advises the Secretary of the Interior, through the BLM, on a variety of planning and management issues associated with the resource management planning process for the Dominguez-Escalante National Conservation Area and Dominguez Canyon Wilderness.

Topics of discussion during Dominguez-Escalante National Conservation Area Advisory Council meeting may include informational presentations from various resource specialists working on the resource management plan, as well as Council working group reports relating to the following topics: Recreation, fire management, land-use planning process descriptions, invasive species management, travel management, wilderness, land exchange criteria, cultural resource management, and other resource management topics of interest to the Council raised during the planning process.

Future meetings in 2011 will be scheduled at this meeting. These meetings are anticipated to occur monthly, and may occur as frequently as every two weeks during intensive phases of the planning process. Dates, times and agendas for these additional meetings will be announced through local media and on the BLM's Web site for the Dominguez-Escalante planning

effort, http://www.blm.gov/co/st/en/nca/denca/denca_rmp.html.

These meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have 30 minutes at the end of the meeting allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Helen M. Hankins,
State Director.

[FR Doc. 2010-31989 Filed 12-20-10; 8:45 am]

BILLING CODE 4310-JB-P**DEPARTMENT OF THE INTERIOR****Bureau of Land Management****[WY-923-1310-FI; WYW163284]****Notice of Proposed Reinstatement of Terminated Oil and Gas Lease WYW 163284, Wyoming****AGENCY:** Bureau of Land Management, Interior.**ACTION:** Notice.

SUMMARY: Under the provisions of the Mineral Leasing Act of 1920, as amended, the Bureau of Land Management (BLM) received a petition for reinstatement from Energy West Corporation for competitive oil and gas lease WYW163284 for land in Sweetwater County, Wyoming. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, Julie L. Weaver, Chief, Fluid Minerals Adjudication, at (307) 775-6176.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of \$10 per acre or fraction thereof, per year and 16-2/3 percent, respectively. The lessee has paid the required \$500 administrative fee and \$163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Sections 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease WYW163284 effective September 1, 2010, under the original terms and conditions of the lease and the increased rental and royalty rates cited above. The BLM has not issued a

valid lease to any other interest affecting the lands.

Julie L. Weaver,
Chief, Branch of Fluid Minerals Adjudication.
[FR Doc. 2010-31927 Filed 12-20-10; 8:45 am]

BILLING CODE 4310-22-P**DEPARTMENT OF JUSTICE****Notice of Extension of Public Comment Period for Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act**

On December 1, 2010, a proposed Consent Decree with Brown County and the City of Green Bay was lodged with the United States District Court for the Eastern District of Wisconsin in a case captioned *United States and the State of Wisconsin v. NCR Corp., et al.*, Case No. 10-C-910 (E.D. Wis.). The Complaint in that case alleges claims under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601-75, against Brown County, the City of Green Bay, and twelve other defendants concerning polychlorinated biphenyl contamination at the Lower Fox River and Green Bay Superfund Site in northeastern Wisconsin (the "Site").

If approved by the Court after a public comment period, the proposed Consent Decree would resolve Brown County's and the City of Green Bay's potential liability for response costs, response actions, and natural resource damages associated with the Site, on the terms and conditions set forth in the Decree. The proposed Consent Decree also would resolve the United States Government's potential liability for response costs, response actions, and natural resource damages associated with the Site under CERCLA. Under the proposed Consent Decree, Brown County, Green Bay, and the United States would pay a total of \$5.2 million (\$350,000 each from Brown County and Green Bay and \$4.5 million from the United States). If the Decree is approved, the \$5.2 million would be paid into a set of Site-specific special accounts for use in financing future cleanup and natural resource restoration work at the Site.

In a **Federal Register** Notice published on December 7, 2010, the Department of Justice announced its intention to receive comments relating to the Consent Decree for a period of thirty (30) days from the date of that publication. 75 FR 76,025 (Dec. 7, 2010). In response to a number of requests, the Department of Justice is extending that

public comment period for four weeks, until February 3, 2011. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and mailed either electronically to pubcommentees.enrd@usdoj.gov or in hard copy to P.O. Box 7611, U.S. Department of Justice, Washington, D.C. 20044-7611. Comments should refer to *United States and the State of Wisconsin v. NCR Corp., et al.*, Case No. 10-C-910 (E.D. Wis.) and D.J. Ref. No. 90-11-2-1045/3.

The Consent Decree may be examined at: (1) The offices of the United States Attorney, 517 E. Wisconsin Avenue, Room 530, Milwaukee, Wisconsin; and (2) the offices of the U.S. Environmental Protection Agency, 77 West Jackson Boulevard, 14th Floor, Chicago, Illinois. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site: http://www.usdoj.gov/enrd/Consent_Decrees.html. A copy of the Consent Decree may also be obtained by mail from the Department of Justice Consent Decree Library, P.O. Box 7611, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$11.00 (44 pages at 25 cents per page reproduction cost) payable to the U.S. Treasury.

Maureen M. Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010-32001 Filed 12-20-10; 8:45 am]

BILLING CODE 4410-15-P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Hazardous Conditions Complaints

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) hereby announces the submission of the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, "Hazardous Conditions Complaints," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before January 20, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, <http://www.reginfo.gov/public/do/PRAMain> or by contacting Michel Smyth by telephone at 202-693-4129 (this is not a toll-free number) or sending an e-mail to DOL_PRA_PUBLIC@dol.gov.

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Mine Safety and Health Administration (MSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202-395-4816/*Fax:* 202-395-6881 (these are not toll-free numbers), e-mail:

OIRA_submission@omb.eop.gov.

FOR FURTHER INFORMATION CONTACT:

Contact Michel Smyth by telephone at 202-693-4129 (this is not a toll-free number) or by e-mail at DOL_PRA_PUBLIC@dol.gov.

SUPPLEMENTARY INFORMATION: Federal Mine Safety and Health Act of 1977, as amended, (Mine Act) section 103(g) provides that a representative of miners, or any individual miner where there is no representative of miners, may submit a written or oral notification of alleged violation or imminent danger of the Mine Act or a mandatory standard or of an imminent danger. The notifier has the right to obtain an immediate inspection by the MSHA. A copy of the notice must be provided to the operator, with individual miner names redacted.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is currently approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1219-0014. The current OMB approval is scheduled to expire on December 31, 2010; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension

while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 16, 2010 (75 FR 56561).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference OMB Control Number 1219-0014. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: Mine Safety and Health Administration (MSHA).

Title of Collection: Hazardous Conditions Complaints.

OMB Control Number: 1219-0014.

Affected Public: Individuals and households.

Total Estimated Number of Respondents: 2,278.

Total Estimated Number of Responses: 2,278.

Total Estimated Annual Burden Hours: 456.

Total Estimated Annual Costs Burden: \$0.

Dated: December 15, 2010.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2010-31947 Filed 12-20-10; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR**Employee Benefits Security Administration****Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Charter Renewal**

In accordance with section 512(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) and the provisions of the Federal Advisory Committee Act and its implementing regulations issued by the General Services Administration (GSA), the charter for the Advisory Council on Employee Welfare and Pension Benefit Plans is renewed.

The Advisory Council on Employee Welfare and Pension Benefit Plans shall advise the Secretary of Labor on technical aspects of the provisions of ERISA and shall provide reports and/or recommendations each year on its findings to the Secretary of Labor. The Council shall be composed of fifteen members appointed by the Secretary. Not more than eight members of the Council shall be of the same political party. Three of the members shall be representatives of employee organizations (at least one of whom shall be a representative of any organization members of which are participants in a multiemployer plan); three of the members shall be representatives of employers (at least one of whom shall be a representative of employers maintaining or contributing to multiemployer plans); three members shall be representatives appointed from the general public (one of whom shall be a person representing those receiving benefits from a pension plan); and there shall be one representative each from the fields of insurance, corporate trust, actuarial counseling, investment counseling, investment management, and accounting.

The Advisory Council will report to the Secretary of Labor. It will function solely as an advisory body and in compliance with the provisions of the Federal Advisory Committee Act, and its charter will be filed under the Act. For further information, contact Larry I. Good, Executive Secretary, Advisory Council on Employee Welfare and Pension Benefit Plans, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693-8668.

Signed at Washington, DC, this 15th day of December 2010.

Michael L. Davis,
Deputy Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2010-31948 Filed 12-20-10; 8:45 am]

BILLING CODE 4510-29-P

DEPARTMENT OF LABOR**Mine Safety and Health Administration**

[OMB Control No. 1219-0003]

Proposed Extension of Existing Information Collection; Radiation Sampling and Exposure Records

AGENCY: Mine Safety and Health Administration.

ACTION: Notice of request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to assure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration (MSHA) is soliciting comments concerning the extension of the information collection for Radiation Sampling and Exposure Records, 30 CFR 57.5037 and 57.5040.

DATES: All comments must be received by midnight Eastern Standard Time on February 22, 2011.

ADDRESSES: Comments must be identified clearly with the rule title and may be submitted to MSHA by any of the following methods:

(1) *Electronic mail:* zzMSHA-Comments@dol.gov.

(2) *Facsimile:* 202-693-9441.

(3) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209-3939.

(4) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Blvd., Room 2350, Arlington, VA 22209-3939. Sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Mario Distasio, Chief of the Economic

Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at distasio.mario@dol.gov (e-mail), 202-693-9445 (voicemail), 202-693-9441 (facsimile).

SUPPLEMENTARY INFORMATION:**I. Background**

Under the authority of Section 103 of the Federal Mine Safety and Health Act of 1977, MSHA is required to—

* * * issue regulations requiring operators to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under any applicable mandatory health or safety standard promulgated under this Act.

Airborne radon and radon daughters exist in every uranium mine and can exist in several other mining commodities. Radon is radioactive gas. It diffuses into the underground mine atmosphere through the rock and the ground water. Radon decays in a series of steps into other radioactive elements, which are solids, called radon daughters. Radon and radon daughters are invisible and odorless. Decay of radon and its daughters results in emissions of alpha energy. Medical doctors and scientists have associated high radon daughter exposures with lung cancer. The health hazard arises from breathing air contaminated with radon daughters which are in turn deposited in the lungs. The lung tissues are sensitive to alpha radioactivity.

Standard 30 CFR 57.5037 establishes the procedures to be used by the mine operator in sampling mine air for the presence and concentrations of radon daughters. Operators are required to conduct weekly sampling where concentrations of radon daughters exceed 0.3 working levels (WL). Sampling is required bi-weekly where uranium mines have readings of 0.1 WL to 0.3 WL and every 3 months in non-uranium underground mines where the readings are 0.1 WL to 0.3 WL. Mine operators are required to make a record of the sampling and retain it for 2 years.

Standard 30 CFR 57.5040 requires mine operators to calculate, record, and report to MSHA individual exposures to radon daughters on MSHA Form 4000-9 "Record of Individual Exposure to Radon Daughters". The calculations are based on the results of the weekly sampling required by 30 CFR 57.5037.

II. Desired Focus of Comments

MSHA is particularly interested in comments that—

- Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

III. Current Actions

This notice contains a request for public comment on the extension of the information collection for existing notification, recordkeeping, and reporting provisions for radiation sampling and exposure records. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

OMB Number: 1219-0003.

Frequency: On Occasion.

Affected Public: Business or other for-profit.

Cost to Federal Government: \$747.

Total Burden Respondents: 5.

Total Number of Responses: 255.

Total Burden Hours: 502 hours.

Total Hour Burden Cost: \$17,018.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 14, 2010.

Patricia W. Silvey,

Director, Office of Standards, Regulations, and Variances.

[FR Doc. 2010-31815 Filed 12-20-10; 8:45 am]

BILLING CODE 4510-43-P

DEPARTMENT OF LABOR

Wage and Hour Division

RIN 1235-ZA00

Reasonable Break Time for Nursing Mothers

AGENCY: Wage and Hour Division, United States Department of Labor.

ACTION: Request for Information from the public.

SUMMARY: This notice is a request for information from the public regarding the recent amendment to the Fair Labor Standards Act (FLSA) that requires employers to provide reasonable break time and a place for nursing mothers to express breast milk for one year after their child's birth. The Department of Labor ("the Department") administers and enforces the FLSA through its Wage and Hour Division. Contained in this notice are the Department's preliminary interpretations of the new break time amendment to the FLSA. The Department seeks information and comments for its review on various issues addressed in this notice, as it considers how best to help employers and employees understand the requirements of the break time for nursing mothers law.

The break time requirement that is now part of the FLSA is set forth in Section 4207 of the Patient Protection and Affordable Care Act, Public Law 111-148 ("Affordable Care Act"). The provision requires employers to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." See 29 U.S.C. 207(r).

The break time requirement became effective when the Affordable Care Act was signed into law on March 23, 2010. To assist employers with complying with the new law, the Department has issued Wage and Hour Fact Sheet #73: "Break Time for Nursing Mothers under the FLSA" at <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>. The Department has also posted Frequently

Asked Questions (FAQs) on its Web site that reiterate the information provided in the Fact Sheet in a different format. Until the Department issues final guidance, the Department's enforcement will be based on the statutory language and the guidance provided in WHD Fact Sheet #73 and the associated FAQs.

Employers, employees, and other stakeholders have requested additional guidance from the Department about the law's requirements and the Department wants to provide an opportunity for the public to submit information and comments for its consideration. The Department will consider the information and comments received in response to this Request for Information in formulating further guidance for the regulated community on complying with the new break time requirement. Until any such further guidance is issued, the RFI provides useful information for employers to consider in establishing policies for nursing employees.

At this time, the Department does not plan to issue regulations implementing this provision. Because of the wide variety of workplace environments, work schedules, and individual factors that will impact the number and length of breaks required by a nursing mother, as well as the manner in which an employer complies with break time requirement, the Department believes that regulations may not be the most useful or effective means for providing initial guidance to employers and employees. If, however, based on its experience administering and enforcing the break time requirement and the comments received in response to this Request for Information, the Department determines that regulations are necessary, it will initiate rulemaking at that time.

This Request for Information contains the Department's preliminary interpretations of the law's requirements. The Department's identification of key issues related to the law and the development of this Request for Information have been informed by the Department's meetings and discussions with various stakeholders, including employer organizations and representatives, public health and women's organizations, state agencies that have experience administering state laws concerning workplace lactation, and individuals and businesses that have contacted the Department with questions about the new law. The Department looks forward to continuing to receive input and invites the public to comment on the break time requirement generally and on the

Department's preliminary interpretations in this Request for Information. All comments will be made publicly available.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments identified by RIN 1235-ZA00 by either of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Please follow the instructions for submitting comments.

Mail: Comments may be mailed to Montaniel Navarro, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210.

Please submit only one copy of your comments by only one method. All submissions must include the agency name and Regulatory Information Number (RIN) identified above for this request for information. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Montaniel Navarro, FLSA Branch Chief, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210, (202) 693-0051.

SUPPLEMENTARY INFORMATION:

I. Background

The Patient Protection and Affordable Care Act (the "Affordable Care Act") amended section 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 207, to require employers to provide nursing mothers reasonable break time and a place to express breast milk. Public Law 111-148, 124 Stat. 119, section 4207. The new requirement became effective when the President signed the Affordable Care Act on March 23, 2010. The specific requirements of the new provision are described below.

Break Time

Employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A). The law states that "[a]n employer shall not be required to compensate an employee receiving reasonable break time [for expressing breast milk] for any work time spent for such purpose." 29 U.S.C. 207(r)(2).

Space

The law further requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an

employee to express breast milk." 29 U.S.C. 207(r)(1)(B).

Undue Hardship Exemption for Employers With Fewer Than 50 Employees

Under the law, "[a]n employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. 207(r)(3).

Relationship to State Laws

The Federal law does not preempt "a State law that provides greater protections to employees than the protections provided for under [the Federal law]." 29 U.S.C. 207(r)(4).

Coverage Under the FLSA Nursing Mothers Provision

As mentioned above, the Affordable Care Act's break time for nursing mothers provision is now part of the FLSA. The FLSA is the Federal law that sets minimum wage, overtime, recordkeeping, and youth employment standards. The break time for nursing mothers provision was added to section 7 of the FLSA, which sets forth premium payment obligations for overtime. The FLSA and the break time for nursing mothers provision apply only to certain employees. First, in order for an employee to be covered by the FLSA, there must be "enterprise coverage" or "individual coverage."

Enterprise Coverage

Employees who work for certain businesses or organizations ("enterprises") are covered by the FLSA. These enterprises, which must have at least two employees, are:

- (1) Those that have an annual dollar volume of sales or business done of at least \$500,000; or
- (2) hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies. 29 U.S.C. 203(s)(1).

Individual Coverage

Even when there is no enterprise coverage, employees are covered by the FLSA if their work regularly involves them in commerce between states ("interstate commerce"). The FLSA covers individual workers who are "engaged in commerce or in the production of goods for commerce." 29 U.S.C. 206(a), 207(a). Examples of employees who are involved in

interstate commerce include those who: produce goods that will be sent out of state (such as a worker assembling components in a factory or a secretary typing letters in an office), regularly make telephone calls to persons located in other states, handle records of interstate transactions, travel to other states on their jobs, and do janitorial work in buildings where goods are produced for shipment outside the state. Also, domestic service workers such as housekeepers, full-time babysitters, and cooks are typically covered by the FLSA. 29 U.S.C. 202(a).

Coverage for Nonexempt Employees

Even if an employee is covered under the FLSA, that employee would only be entitled to break time to express breast milk if she is not exempt from section 7 of the FLSA, which sets forth the Act's overtime pay requirements. Unless specifically exempted, the FLSA requires payment of overtime to covered employees for hours worked in excess of 40 hours per workweek at a rate not less than time and one-half of their regular rates of pay. Because the Affordable Care Act amended section 7 of the FLSA, the break time for nursing mothers provision does not apply to employees who are exempt from the provisions of section 7. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the requirements of section 7, they may be obligated to provide such breaks under state laws. The Department encourages employers to provide break time for all nursing mothers including those who may not be covered under the FLSA or who are exempt from section 7.

II. Key Issues on Which Public Comment Is Requested

In this document, the Department shares its preliminary interpretations of the law, and seeks public comment on any and all issues concerning the reasonable break time for nursing mothers law. The Department specifically seeks comment on certain issues and preliminary interpretations, as noted below.

a. Unpaid Break Time

Employers are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk. 29 U.S.C. 207(r)(2). The FLSA does not require an employer to provide its employees with rest periods or breaks. However, if the employer permits short breaks, usually 20 minutes or less, the time must be counted as hours worked when determining if the FLSA requirements for payment of

minimum wage and/or overtime have been satisfied. *See* 29 CFR 785.18. Where an employer already provides paid breaks, an employee who uses that break time to express milk must be paid in the same way that other employees are compensated for break time.

Additional time used beyond the authorized paid break time could be uncompensated. For example, if an employer provides a 20 minute paid break and a nursing employee uses that time to express milk and takes a total of 25 minutes for this purpose, the five minutes in excess of the paid break time does not have to be compensated. The FLSA's general requirement that the employee must be completely relieved from duty applies; if a nursing employee is not completely relieved from duty during a break to express breast milk, the time must be compensated as work time. *See* WHD Fact Sheet #22, Hours Worked Under the FLSA at <http://www.dol.gov/whd/regs/compliance/whdfs22.htm>.

Although the FLSA does not require employers to allow employees to extend their workday (*i.e.*, begin work earlier or end work later) to make up for unpaid break time used for expressing milk, the Department encourages employers to provide flexible scheduling for those employees who choose to make up for any unpaid break time.

b. Reasonable Break Time

Employers must provide "a reasonable break time" for nursing mothers to express breast milk "each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A). In implementing the requirements of this provision, employers should consider both the frequency and number of breaks a nursing mother might need and the length of time she will need to express breast milk. The information provided below is intended to help employers in this assessment so that they can develop policies that meet the requirements of the law and make sense for their work environment.

The Department has consulted with public health officials from the U.S. Department of Health and Human Services, including the Centers for Disease Control and Prevention (CDC) and the Health Resources and Services Administration, in order to better understand a nursing mother's physiological needs and to inform our initial determinations regarding the frequency and timing of breaks to express breast milk. The information that follows stems from the guidance provided by the lactation experts at

these public health agencies.¹ The frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal daily schedule, whether the baby is eating solid food, and other factors. In the early months of life a baby may need as many as 8 to 12 feedings per day. This means that a nursing baby needs food every two to three hours. A nursing mother produces milk on a constant basis. If the baby does not take the milk directly from the mother, it must be removed by a pump about as frequently as the baby usually nurses. If a mother is unable to express breast milk while she is away from her baby, she may experience a drop in her milk supply which could result in her being unable to continue nursing her child. The inability to express milk may also lead to an infection. Depending on the nursing mother's work schedule, it may be that the frequency of breaks needed tracks regular breaks and lunch periods, but this will not always be the case. As the child grows and begins to consume solid foods, typically around six months of age, the frequency of nursing often decreases, and the need for a nursing mother to take breaks to express breast milk may also gradually diminish.

The Department expects that nursing mothers typically will need breaks to express milk two to three times during an eight hour shift. Longer shifts will require additional breaks to express milk.

The length of time necessary to express milk also varies from woman to woman. The act of expressing breast milk alone typically takes about 15 to 20 minutes, but there are many other factors that will determine a reasonable break time. Employers should consider these factors when determining how they will provide both reasonable break time and space for nursing mothers. For example, factors such as the location of the space and the amenities nearby (*e.g.*, proximity to employee's work area, availability of sink for washing, location of refrigerator or personal storage for the milk, *etc.*) can affect the length of break an employee will need to express milk. Some of the factors employers should consider in determining whether the time needed for a nursing employee to express milk is "reasonable" include:

(i) The time it takes to walk to and from the lactation space and the wait, if any, to use the space;

(ii) Whether the employee has to retrieve her pump and other supplies from another location;

(iii) Whether the employee will need to unpack and set up her own pump or if a pump is provided for her;

(iv) The efficiency of the pump used to express milk (employees using different pumps may require more or less time);

(v) Whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk, or what additional steps she will need to take to maintain the cleanliness of the pump attachments;

(vi) The time it takes for the employee to store her milk either in a refrigerator or personal cooler.

Nursing employees are encouraged to discuss with their employers what they expect they will need in terms of frequency and timing of breaks to express milk. Employers are encouraged to discuss with nursing employees the location and availability of space for expressing milk as that will affect the time required for the breaks. These discussions will help employers and employees to develop shared expectations and an understanding of what will constitute "a reasonable break time" and how to incorporate the breaks into the work period.

In assessing the reasonableness of break time provided to a nursing employee, the Department will consider all the steps reasonably necessary to express breast milk, not merely the time required to express the milk itself.

c. Space for Expressing Breast Milk

The break time for nursing mothers provision requires that covered employers provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. 207(r)(1)(B). The Department's initial interpretation of the requirement that the space be "shielded from view and free from intrusion" is that it requires employers where practicable to make a room (either private or with partitions for use by multiple nursing employees) available for use by employees taking breaks to express milk. Where it is not practicable for an employer to provide a room, the requirement can be met by creating a space with partitions or curtains. Any windows in the designated room or

¹ *See* "The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksite", U.S. Department of Health and Human Services, Health Resources and Services Administration (2008), available at <http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/index.cfm>.

space should be covered to ensure the space is “shielded from view.” With any space provided for expressing milk, the employer must ensure the employee’s privacy through means such as signs that designate when the space is in use, or a lock on the door.

The employer is not obligated to maintain a permanent, dedicated space for nursing mothers. A space temporarily created or converted into a space for expressing milk or made available when needed by a nursing mother is sufficient provided that the space is shielded from view, and free from intrusion from coworkers and the public.

While a bathroom, even if it offers privacy, does not meet the requirements of the statute, an anteroom or lounge area connected to the bathroom may be sufficient to meet the requirements of the law. For example, if there is a wall with a door separating the lounge area from the bathroom, and if there is a space for nursing mothers within the lounge that is “shielded from view” and “free from intrusion,” this would likely meet the requirements of the law. The Department would appreciate comments on whether and under what circumstances rooms that adjoin bathrooms could be compliant with the law.

Locker rooms that function as changing rooms (*i.e.*, for changing in and out of uniforms) may also be adequate as long as there is a separate space designated within the room for expressing milk that is shielded from view and free from intrusion. The Department does not believe, however, that a locker room where there is not sufficient differentiation between the toilet area and the space reserved for expressing breast milk would meet the requirements of the law because it presents similar health and sanitation concerns as a bathroom. There is concern that locker rooms may not be appropriate because such wet environments are at risk of being contaminated with pathogenic bacteria and have been linked to outbreaks of methicillin-resistant *Staphylococcus aureus* (MRSA). The Department would appreciate comments on whether and under what circumstances locker rooms could be compliant with the law.

Because the statute requires employers to provide break time “each time such employee has need to express the milk,” employers should consider the number of nursing mothers employed and their work schedules to determine the location and number of spaces to designate or create. As described above, the amount of time that is reasonable for a nursing

employee to express milk is dependent in part on her ability to access a suitable space. In order to accommodate significant numbers of nursing mothers, some large employers may choose to include nursing mothers’ rooms in their floor plans and provide a room on multiple floors of their facility or in an on-site health facility. Other employers may provide a large room with privacy screens so that the room may be used simultaneously by several nursing employees. Where the designated space is so far from the employee’s work area as to make it impractical for the employee to take breaks to express milk, or where the number of nursing employees needing to use the space either prevents an employee from taking breaks to express milk or necessitates prolonged waiting time, the Department will not consider the employer to be in compliance with the requirement to provide reasonable break time.

In order to be a functional space “that may be used by an employee to express breast milk,” at a minimum, a space must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump. Ideally, the space will have access to electricity, so that a nursing mother can plug in an electric pump rather than use a pump with battery power. There are a range of additional features that some employers have included when providing spaces for their employees to use to express breast milk, such as sinks within or nearby the room for washing hands and cleaning pump attachments, and refrigerators within or nearby the room for storing expressed milk. While such additional features are not required, the Department notes that their provision may decrease the amount of break time needed by nursing employees to express milk.

The Department interprets an employee’s right to express milk for a nursing child to include the ability to safely store the milk for her child.² While employers are not required to provide refrigeration options for nursing mothers for the purpose of storing expressed milk, they must allow a nursing mother to bring a pump and insulated food container to work for expressing and storing the milk and ensure there is a place where she can store the pump and insulated food container while she is at work. This is similar to providing employees with a place to store lunch or meals that they

bring to work in insulated food containers. In many workplaces the nursing mother will be able to keep the pump and insulated container near her work space, but in some settings it may be necessary to have a separate place for her to stow the pump and insulated food container (*e.g.*, a locker, closet, cabinet, or other space where the pump and container will not be disturbed or contaminated).

The Department is aware that there are many work settings that are not in office buildings, and that this can pose unique challenges to providing an adequate space for nursing mothers to express milk. For example, there are nursing employees who work in retail settings, quick service food stores and restaurants, construction or outdoor work sites, factories, or in other non-office building settings. Some of these workplaces may have limited space available to convert into a designated space to express breast milk. In order to meet the obligations of the law, employers need not create a permanent, dedicated space for expressing milk.

The Department is aware that many such employers have found ways to provide break time and space for nursing employees even though there was no readily available “unused” space. For example, in restaurants and small retail settings, employers have made spaces normally designated for other purposes available when needed by the nursing mother. Malls or retail shopping centers have designated shared space to be used by employees of the various tenant businesses. The Department would appreciate comments that address the conditions under which spaces such as manager’s offices, storage spaces, utility closets, and other such spaces normally used for other purposes could be considered adequate spaces for use by nursing mothers under the statute. In addition, the Department solicits comments on the kinds of shared space arrangements that would be acceptable under the law.

Similarly, the Department would appreciate comments that address how employers can provide adequate break time and space for nursing employees who are not in a fixed place during a work shift (*e.g.*, bus drivers, mail or parcel delivery workers, law enforcement officers, emergency medical technicians, *etc.*). In general, the Department would appreciate comments that describe creative solutions to providing break time and space for nursing mothers so that we can share these examples more broadly.

Employers have also asked the Department what their obligation is to provide a space when their nursing

² The CDC Web site contains recommended guidelines for the safe preparation and storage of expressed breast milk. See http://www.cdc.gov/breastfeeding/recommendations/handling_breastmilk.htm.

employee is located at a client's worksite, rather than the employer's worksite. It is the Department's view that the statutory language makes it the obligation of the employer to provide the space, regardless of where the employee is located. In situations where the employee is off-site, the Department recommends that the employer arrange with the client to allow the employee to use a space at the client's site for the purpose of expressing milk. It may be that the client's worksite already has a designated space for expressing milk for its own employees that can be used by the contract employee. Where a joint employment relationship exists between the employer and client in relation to the nursing employee, both parties would be viewed as having the obligation to provide reasonable break time and an appropriate space in which to express milk. The Department would appreciate comments and recommendations as to how employers can meet their obligations under the law to provide break time and space for nursing mother employees who are working at other sites.

d. Notice

In order to facilitate an employer's ability to provide appropriate space for expressing milk, the Department encourages nursing employees to give employers advance notice of their intent to take breaks at work to express milk. The Department believes that a simple conversation between an employee and a supervisor, manager, or human resources representative about the employee's intent to take breaks for the purpose of expressing breast milk would facilitate an employer's ability to make arrangements to comply with the law before the nursing mother returns to work. The Department solicits comments about how best to address notice issues consistent with the language and purpose of the law, bearing in mind that the employer must provide the break time and lactation space "each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A).

The Department notes that an employer may ask an expectant mother if she intends to take breaks to express milk while at work. Doing so informs employees of their rights under the law and allows the employer the opportunity to make any necessary adjustments to comply with the law.

e. Undue Hardship Exemption

The break time for nursing mothers statutory provision provides an undue hardship exemption that is only available for employers with fewer than

50 employees that meet certain conditions, as further described below. Employers with 50 or more employees must comply with the law without exception. 29 U.S.C. 207(r)(3). Unlike the Family Medical Leave Act, in which Congress specifically excluded from coverage worksites where an employer employs less than 50 employees or where the total number of employees employed by that employer within 75 miles of a particular worksite is less than 50 employees, Congress did not provide such specifications for determining the application of the break time for nursing mothers provision to small employers or worksites with few employees. The statutory language of section 7(r)(3) sets forth the number of employees without further specifications such as the number of employees per worksite, or in a geographic area, for example. Therefore, the Department has concluded that covered employers must count all employees who work for the employer, including all work sites, when determining whether this exemption might apply.

Because the nursing mothers break time requirements were added to the FLSA, the Department will apply the FLSA definition of "employee" in section 3(e)(1) when counting employees. Thus, "any individual employed by an employer" must be counted, including full-time employees, part-time employees, and any other individuals who meet the FLSA definition of an employee.

In addition, the Department intends to use the FLSA workweek standard for purposes of counting whether the employer has fewer than 50 employees. See 29 CFR 778.105. The Department recognizes that some employers' workforces fluctuate from week to week, and that some businesses experience variation in workforce size over the course of time, for myriad reasons. However, the Department believes it is necessary to fix the workweek at which the number of employees are counted for purposes of the undue hardship exemption because a nursing mother necessarily relies on the availability of the breaks, and fluctuation in the ability to express breast milk at work may cause the woman to lose the ability to produce sufficient milk for her child, frustrating the purpose of the law. The Department solicits comments as to the appropriate point at which to count the number of employees for purposes of determining whether the employer may assert an undue hardship defense. The Department is considering whether the number of employees should be counted in the workweek in which the employee

notifies the employer that she intends to take breaks to express milk, in the first workweek the employee intends to utilize the breaks and the space to express milk at work, or at some other point. Further, the Department believes that an employer that has previously claimed the undue hardship exemption will no longer be eligible for the exemption if the number of employees employed by the employer rises to 50 or more at the point determined above. The Department solicits comments on this interpretation as well.

The employer bears the burden of proof that compliance with the nursing mothers break time provision would be an undue hardship. In addition to demonstrating that the employer employs fewer than 50 employees, an employer that wishes to avail itself of the exemption must show that compliance would cause the employer "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. 207(r)(3). Because these factors and the number of employees employed by a particular employer will vary depending on the circumstances at the time the request for break time is made, the Department will not grant prospective undue hardship exemptions to employers. The undue hardship exemption will operate as an affirmative defense raised by an employer that seeks to demonstrate to the Department why it is unable to accommodate a particular nursing employee under the law. For example, if the Department were investigating a complaint made by a nursing mother who claims her employer is not complying with the law, the employer would have an opportunity at that time to demonstrate to the Department why it qualifies in that instance for an undue hardship exemption based on the statutory factors.

Because the law only requires space and time for unpaid breaks for one year after a child's birth, and the employer must be able to demonstrate "significant" difficulty or expense, the Department believes that this is a stringent standard that will result in employers being able to avail themselves of the exemption only in limited circumstances. Employers with fewer than 50 employees may not presume that having a smaller workforce by itself sufficiently demonstrates that compliance would pose a significant difficulty or expense; the difficulty or expense must be shown in light of the factors listed in the statute. The Department expects and encourages such small employers to

approach compliance creatively and constructively, and will evaluate each undue hardship claim by applying the statutory factors to the particular factual circumstances of a case. The Department solicits comments on whether this undue hardship standard, which is very similar to the undue hardship standard in the Americans With Disabilities Act, 42 U.S.C. 12111(10) ("significant difficulty or expense" when considered in light of factors such as financial resources, size, type of operation and workforce structure), should be interpreted in the same way the undue hardship defense has been interpreted under that law.

f. Relationship to the Family Medical Leave Act

The Department has received several inquiries concerning the relationship of the nursing mothers break time provision to the Family Medical Leave Act ("FMLA"). The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. See 29 U.S.C. 2601 *et seq.* Among the qualifying reasons for taking FMLA leave are to care for a newborn child within one year of birth and for the employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job. FMLA protections do not extend to leave taken for reasons not covered by the Act. See WHD Fact Sheet # 28 The Family and Medical Leave Act of 1993 at <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>.

The Department does not believe that breaks to express breast milk can properly be considered to be FMLA leave or counted against an employee's FMLA leave entitlement. While employees are entitled to take FMLA leave due to her own serious health condition, the Department does not consider expressing milk at work to constitute bonding with or caring for a newborn child. See 29 CFR 825.120. Also, while an eligible employee may take FMLA leave due to her own serious health condition, the Department does not believe that expressing milk will typically be associated with a serious health condition under the FMLA. See 29 CFR 825.113–115.

g. Enforcement

The Department's Wage and Hour Division (WHD) is charged with administering and enforcing the FLSA, which includes the new break time for nursing mothers provision. The enforcement of the FLSA is carried out by WHD investigators. As the WHD's

authorized representatives, they conduct investigations and gather data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law. 29 U.S.C. 211. Where violations are found, they also may recommend changes in employment practices to bring an employer into compliance.

If an employee would like to file a complaint because she believes her employer has violated the break time for nursing mothers requirement under the FLSA, she should call the toll-free WHD number 1–866–487–9243 and she will be directed to the nearest WHD office for assistance. The WHD Web site at <http://www.dol.gov/wecanhelp/howtofilecomplaint.htm> provides basic information about how to file a complaint and how the WHD will investigate complaints.

To the extent possible, WHD intends to give priority consideration to complaints received by the agency alleging that an employer is failing to provide break time and a space to express milk as required by law to allow expeditious resolution of the matter in order to preserve the employee's ability to continue to breastfeed and express milk for her child.

Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. 216(b). Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.

If an employer refuses to comply with the requirements of section 7(r), however, the Department may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee. 29 U.S.C. 217. For example, if an employer terminates a nursing mother employee because she takes breaks to express milk that she is entitled to under the FLSA, or because she has informed her employer that she intends to take breaks to express breast milk, this would be considered a violation of 29 U.S.C. 15(a)(2) (*i.e.*, an unlawful violation of section 7(r)). In such a case, the Department could pursue injunctive relief in federal district court and seek reinstatement and lost wages for the employee. Additionally, if an employee is "discharged or in any other manner

discriminated against" because she has filed a complaint or caused to be instituted any proceeding regarding break time for expressing breast milk, the employee may file a retaliation complaint with the Department or she may file a private cause of action seeking reinstatement, lost wages, and other appropriate remedies. 29 U.S.C. 215(a)(3), 216(b).

If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964.³

h. Compliance Assistance

The Department is determining how best to provide assistance to employees as well as to employers seeking to comply with the new break time for nursing mothers requirement. The Department has established a website that provides a compilation of resources that employers, employees, lactation consultants, and other interested stakeholders might find useful as they seek to develop workplace lactation programs. See <http://www.dol.gov/whd/nursingmothers>. We are interested generally in hearing from the public about the kinds of information and resources that would be most helpful to employers and employees as they seek to comply with the requirements of the law and to exercise the break time right provided under the law.

i. Additional Resources

Employers and employees are encouraged to review information issued by the Department of Health and Human Services (HHS) concerning workplace lactation programs. The Health Resources and Services Administration within HHS has published a resource kit, *The Business Case for Breastfeeding*, which includes materials for management, human resource managers, and others involved in implementing on-site programs for lactation support and may be accessed at <http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/index.cfm>. The Centers for Disease Control and Prevention within HHS has a Healthier Worksite Initiative that offers a toolkit to help employers establish a comprehensive lactation support program for nursing mothers at the worksite. The toolkit is available at <http://www.cdc.gov/nccdphp/dnpao/>

³ The Equal Employment Opportunity Commission (EEOC) should be consulted for further information about Title VII. See <http://www.eeoc.gov>.

hwi/toolkits/lactation/index.htm. Several non-profit organizations and state breastfeeding coalitions also provide resources to help employers develop lactation policies and programs. In addition, employers may wish to review the Equal Employment Opportunity Commission's "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" which is available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

III. Electronic Access

An electronic version of this Request for Information is available on the Internet at <http://www.regulations.gov> and <http://www.dol.gov/whd/nursingmothers>.

Nancy J. Leppink,

Deputy Administrator, Wage and Hour Division.

[FR Doc. 2010-31959 Filed 12-20-10; 8:45 am]

BILLING CODE 4510-27-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-162)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF000, Washington, DC 20546, (202) 358-1351, Lori.Parker@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

NASA is requesting a Generic Clearance for data collection to integrate program planning, program accountability, management, and monitoring information pertaining to the NASA's education and outreach efforts. NASA's education and outreach portfolio includes efforts that span various organizational units within NASA.

II. Method of Collection

Electronic.

III. Data

Title: NASA Education Generic Clearance.

OMB Number: 2700-xxxx.

Type of review: Regular.

Affected Public: Business or other for-profit; not-for-profit institutions; individuals or households.

Number of Respondents: 2,236,000.

Responses per Respondent: 1.

Annual Responses: 2,444,000.

Hours per Request: 0.15-.5 hour.

Annual Burden Hours: 245,333.

Frequency of Report: On occasion, quarterly, semi-annually, annually.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010-31955 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-165)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358-1351, Lori.Parker@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

As required in Section 305(b) of the National Aeronautics and Space Act of 1958 and the NASA Supplement to the Federal Acquisition Regulation, NASA R&D contracts require contractor/recipient reporting of new technologies to NASA using NASA eNTRe system for electronic submissions and NASA Form 1679 for paper submissions.

II. Method of Collection

NASA will utilize a web-base on-line form to collect this information. Approximately 65 per cent of the responses will be collected electronically.

III. Data

Title: AST-Technology Utilization.

OMB Number: 2700-0009.

Type of review: Regular.

Affected Public: Business or other for-profit and not-for profit institutions.

Estimated Number of Respondents: 1283.

Estimated Time per Response: 1 hour for manual responses and 0.75 hour for electronic responses.

Estimated Total Annual Burden Hours: 1075.

Estimated Total Annual Cost: \$0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance

of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,
NASA PRA Clearance Officer.

[FR Doc. 2010-31974 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-166)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358-1351, Lori.Parker@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection, JSC Form 1625, has to do with operational groups

at JSC and other NASA centers, NASA contractors, subcontractors, and vendors to provide descriptions of radioactive items used in or supplied for human space missions or approved JSC projects. The form also provides records of accountability, responsibility, transfer, location, and disposition of these items.

II. Method of Collection

The form, which is now available electronically, accompanies a physical shipment of nuclear materials and requires recipients to confirm shipment receipt. Converting the form to an electronic format and making it available on line has significantly reduced the burden of information gathering for respondents.

III. Data

Title: Radioactive Material Transfer Receipt.

OMB Number: 2700-0007.

Type of review: Renewal without change of Currently Approved Collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 25.

Estimated Total Annual Burden Hours: 10.

Estimated Total Annual Cost to Government: \$10,000.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,
NASA Clearance Officer.

[FR Doc. 2010-31976 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-164)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA Clearance Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358-1351, Lori.Parker@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Aeronautics and Space Administration (NASA) is requesting renewal of an existing collection that is used to help NASA to assess the services provided by its procurement offices. The NASA Procurement Customer Survey is used to determine whether NASA's Procurement Offices are providing an acceptable level of service to the business/educational community, and if not, which areas need improvement. Respondents will be business concerns and educational institutions that have been awarded a NASA procurement, or are interested in receiving such an award.

II. Method of Collection

NASA uses electronic methods to collect information from collection respondents.

III. Data

Title: NASA Procurement Customer Survey.

OMB Number: 2700-0101.

Type of review: Extension of a currently approved collection.

Affected Public: Business or other for-profit; Not-for-profit institutions.

Estimated Number of Respondents: 1,000.

Estimated Annual Responses: 500.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 125.

Estimated Total Annual Cost: \$0.

Estimated Total Annual Cost: \$0.00.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA Clearance Officer.

[FR Doc. 2010-31957 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-163)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

DATES: All comments should be submitted within 30 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF000, Washington, DC 20546, (202) 358-1351, Lori.Parker@nasa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

NASA will require responsible officials for grant applicant institutions to sign this document as part of the application package grant award. The requirement for such an assurance of non-discrimination is long-standing and derives from NASA civil rights implementing regulation for Title VI of the Civil Rights Act of 1964.

II. Method of Collection

Paper form, signed by applicants.

III. Data

Title: NASA Assurance of Civil Rights Compliance Form.

OMB Number: 2700-xxxx.

Type of review: Regular.

Affected Public: Business or other for-profit; not-for-profit institutions.

Number of Respondents: 2855.

Responses per Respondent: 1.

Annual Responses: 2855.

Hours per Request: 4.

Annual Burden Hours: 11420.

Frequency of Report: On occasion, as parties apply for grants.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,

NASA PRA Clearance Officer.

[FR Doc. 2010-31956 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-167)]

NASA Advisory Council; Exploration Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the Exploration Committee of the NASA Advisory Council.

DATES: Tuesday, January 11, 2011, 10:30 a.m.-5:45 p.m., Local Time

ADDRESSES: NASA Headquarters, Glennan Conference Room-1Q39; 300 E Street, SW., Washington, DC 20546

FOR FURTHER INFORMATION CONTACT: Dr. Bette Siegel, Exploration Systems Mission Directorate, National Aeronautics and Space Administration Headquarters, 300 E Street, SW., Washington, DC 20546, 202/358-2245; bette.siegel@nasa.gov.

SUPPLEMENTARY INFORMATION: The agenda topics for the meeting will include:

- Status of the Exploration Program.
- Future Planning for Human Exploration.
- Status of the Commercial Crew Initiative.
- Final Report of the Ad-Hoc Task Force on Planetary Defense.

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will need to show a valid government-issued picture identification such as driver's license or passport at the Visitor Center in the West Lobby, and must state they are attending the NASA Advisory Council Exploration Committee meeting in the Glennan Conference Room-1Q39. Further, *no later than January 3, 2011*, all non-U.S. citizens must submit the following information to Dr. Bette Siegel, Room 7T15, NASA Headquarters, 300 E Street, SW., Washington, DC 20546; Fax (202) 358-3091: Name, current address, citizenship, company affiliation (if applicable) to include address, telephone number, and their title, place of birth, date of birth, U.S. visa information to include type, number, and expiration date, U.S. Social Security Number (if applicable), Permanent

Resident Alien card number and expiration date (if applicable), place and date of entry into the U.S., and passport information to include country of issue, number, and expiration date.

For questions, please call Bette Siegel at (202) 358-2245.

Dated: December 14, 2010.

P. Diane Rausch,

*Advisory Committee Management Officer,
National Aeronautics and Space
Administration.*

[FR Doc. 2010-31977 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

State, Local, Tribal, and Private Sector Policy Advisory Committee

AGENCY: National Archives and Records Administration.

ACTION: Notice of Establishment of a NARA Advisory Committee, Pursuant to the Federal Advisory Committee Act, 5 U.S.C. Appendix 2 and by Section 3(d) of Executive Order 13549.

SUMMARY: The President of the United States has determined that the establishment of the State, Local, Tribal, and Private Sector Policy Advisory Committee is necessary and is in the public interest in connection with the Classified National Security Information Program. This committee will comply with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2).

FOR FURTHER INFORMATION CONTACT: Mary Ann Hadyka, 301-837-1782.

SUPPLEMENTARY INFORMATION: This Committee shall discuss Classified National Security Information Program-related policy issues in dispute in order to facilitate their resolution and to otherwise recommend changes to policies and procedures that are designed to remove undue impediments to the sharing of information under the Program.

Dated: December 15, 2010.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. 2010-32146 Filed 12-20-10; 8:45 am]

BILLING CODE 7515-01-P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Information Security Oversight Office

State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS-PAC)

AGENCY: Information Security Oversight Office, National Archives and Records Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2) and implementing regulation 41 CFR 101-6, the Information Security Oversight Office (ISOO) announces the inaugural meeting of the State, Local, Tribal, and Private Sector Policy Advisory Committee (SLTPS-PAC). The SLTPS-PAC will advise the President, the Secretary of Homeland Security, the Director of the Information Security Oversight Office (ISOO), and other executive branch officials on all matters concerning the policies relating to access to and safeguarding of classified national security information by U.S. State, Local, Tribal, and Private Sector Entities, as specified in Executive Order 13549 and its implementing directive.

DATES: The meeting will be held on Tuesday, January 11, 2011 from 1 p.m. to 3 p.m.

ADDRESSES: National Archives and Records Administration, 700 Pennsylvania Avenue, NW, Jefferson Room, Washington, DC 20408.

SUPPLEMENTARY INFORMATION: This meeting will be open to the public. However, due to space limitations and access procedures, the name and telephone number of individuals planning to attend must be submitted to the Information Security Oversight Office no later than Thursday, January 6, 2011. ISOO will provide additional instructions for gaining access to the location of the meeting.

FOR FURTHER INFORMATION CONTACT: Robert J. Skwirot, Senior Program Analyst, ISOO, National Archives Building, 700 Pennsylvania Avenue, NW., Washington, DC 20408, telephone number (202) 357-5398, or at robert.skwirot@nara.gov. Contact ISOO at ISOO@nara.gov.

Dated: December 16, 2010.

Mary Ann Hadyka,

Committee Management Officer.

[FR Doc. 2010-32150 Filed 12-20-10; 8:45 am]

BILLING CODE 7515-01-P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of Meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT:

Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606-8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606-8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* January 12, 2011.

Time: 8:30 a.m. to 5 p.m.

Location: Library of Congress, Jefferson Building, Room LJ-220, 101 Independence Avenue, SE., Washington, DC 20540

Program: This meeting will review applications for American History and Foreign Relations/American Studies in Kluge Fellowships, submitted to the Division of Research Programs at the July 15, 2010 deadline.

2. *Date:* January 13, 2011.

Time: 8:30 a.m. to 5 p.m.

Location: Library of Congress, Jefferson Building, Room LJ-220, 101 Independence Avenue, SE., Washington, DC 20540

Program: This meeting will review applications for American History and Foreign Relations/American Studies in Kluge Fellowships, submitted to the Division of Research Programs at the July 15, 2010 deadline.

3. *Date:* January 14, 2011.

Time: 8:30 a.m. to 5 p.m.

Location: Library of Congress, Jefferson Building, Room LJ-220, 101 Independence Avenue, SE., Washington, DC 20540

Program: This meeting will review applications for Political Science and Law/European, Asian, and Middle Eastern Studies in Kluge Fellowships, submitted to the Division of Research Programs at the July 15, 2010 deadline.

Michael P. McDonald,

Advisory Committee Management Officer.

[FR Doc. 2010-31998 Filed 12-20-10; 8:45 am]

BILLING CODE 7536-01-P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes: Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of Meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) will convene a teleconference meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on January 5, 2011, to discuss: (1) The ACMUI reporting structure; (2) rulemaking and implementation guidance for physical protection of byproduct material; and (3) the impacts of the draft safety culture policy statement for medical licensees. Contingent upon the outcome of the January 5, 2011, the NRC will also convene a second teleconference of the ACMUI on January 12, 2011, to further discuss the ACMUI reporting structure. A copy of the agenda for each meeting will be available at <http://www.nrc.gov/reading-rm/doc-collections/acmui/agenda> or by contacting Ms. Ashley Cockerham using the information below.

DATES: The first teleconference meeting will be held on Wednesday, January 5, 2011, 1 p.m. to 3 p.m. Eastern Standard Time (EST). The second teleconference meeting will be held on Wednesday, January 12, 2011, from 1 p.m. to 2 p.m. EST.

Public Participation: Any member of the public who wishes to participate in the teleconference discussions should contact Ms. Cockerham using the contact information below.

Contact Information: Ashley M. Cockerham, *e-mail:* ashley.cockerham@nrc.gov, telephone: (240) 888-7129.

Conduct of the Meeting

Leon S. Malmud, M.D., will chair the meeting. Dr. Malmud will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. Persons who wish to provide a written statement should submit an electronic copy to Ms. Cockerham at the contact information listed above. All submittals must be received five business days prior to the meeting and must pertain to the topic(s) on the agenda for the meeting.

2. Questions and comments from members of the public will be permitted during the meetings, at the discretion of the Chairman.

3. The transcripts will be available on the ACMUI's Web site (<http://www.nrc.gov/reading-rm/doc-collections/acmui/tr/>) approximately 30 calendar days following the meetings. Meeting summaries will be available approximately 30 business days following the meetings.

The meetings will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, *U.S. Code of Federal Regulations*, Part 7.

Dated: December 15, 2010.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. 2010-32009 Filed 12-20-10; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NRC-2010-0002]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATES: Weeks of December 20, 27, 2010, January 3, 10, 17, 24, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of December 20, 2010

Tuesday, December 21, 2010

9:30 a.m. Briefing on the Threat Environment Assessment (Closed—Ex. 1).

1 p.m. Briefing on Security Issues (Closed—Ex. 1).

Week of December 27, 2010—Tentative

There are no meetings scheduled for the week of December 27, 2010.

Week of January 3, 2011—Tentative

There are no meetings scheduled for the week of January 3, 2011.

Week of January 10, 2011—Tentative

Tuesday, January 11, 2011

9:30 a.m. Discussion of Management Issues (Closed—Ex. 2).

Week of January 17, 2011—Tentative

There are no meetings scheduled for the week of January 17, 2011.

Week of January 24, 2011—Tentative

Monday, January 24, 2011

1 p.m. Briefing on Safety Culture Policy Statement (Public Meeting), (Contact: Diane Sieracki, 301-415-3297).

This meeting will be webcast live at the Web address—<http://www.nrc.gov>.

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415-1292. Contact person for more information: Rochelle Baval, (301) 415-1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/about-nrc/policy-making/schedule.html>.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Angela Bolduc, Chief, Employee/Labor Relations and Work Life Branch, at 301-492-2230, TDD: 301-415-2100, or by e-mail at angela.bolduc@nrc.gov. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like

to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301-415-1969), or send an e-mail to darlene.wright@nrc.gov.

Dated: December 16, 2010.

Rochelle C. Baval,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2010-32133 Filed 12-17-10; 4:15 pm]

BILLING CODE 7590-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63550; File No. SR-NYSEArca-2010-115]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Options Rule 5.3(j) To Permit Trading Options on Leveraged Exchange-Traded Notes and Broaden the Definition of Futures Linked Securities

December 15, 2010.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on December 9, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Options Rule 5.3(j) to: (1) Permit trading options on leveraged (multiple or inverse) exchange-traded notes, and (2) broaden the definition of "Futures-Linked Securities [sic]. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of,

and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Arca Options Rule 5.3(j) to: (1) Permit trading options on leveraged (multiple or inverse) exchange-traded notes ("ETNs"), and (2) broaden the definition of "Futures-Linked Securities."⁴ ETNs are also known as "Index-Linked Securities," which are designed for investors who desire to participate in a specific market segment by providing exposure to one or more identifiable underlying securities, commodities, currencies, derivative instruments, or market indexes of the foregoing. Index-Linked Securities are the nonconvertible debt of an issuer that have a term of at least one (1) year but not greater than thirty (30) years. Despite the fact that Index-Linked Securities are linked to an underlying index, each trade as a single exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options apply to Index-Linked Securities.

Leveraged ETN Options

The Exchange proposes to amend NYSE Arca Options Rule 5.3(j) to permit the listing of options on leveraged (multiple or inverse) ETNs. Multiple leveraged ETNs seek to provide investment results that correspond to a specified multiple of the percentage performance on a given day of a particular Reference Asset. Inverse leveraged ETNs seek to provide investment results that correspond to the inverse (opposite) of the percentage performance on a given day of a particular Reference Asset by a specified multiple. Multiple leveraged ETNs and inverse leveraged ETNs differ from traditional ETNs in that they do not merely correspond to the performance of a given Reference Asset, but rather attempt to match a multiple or inverse of a Reference Asset's performance.

The Barclays Long B Leveraged S&P 500 TR ETN ("BXUB"), the Barclays Long C Leveraged S&P 500 TR ETN ("BXUC"), and the UBS AG 2x Monthly Leveraged Long Exchange-Traded Access Securities (E-TRACS) linked to the Alerian MLP Infrastructure Index due July 9, 2040 ("MLPL") currently trade on the NYSE Arca equity platform and are examples of multiple leveraged ETNs. In addition, the Barclays ETN + Inverse S&P 500 VIX Short-Term Futures ETN ("XXV") currently trades on the NYSE Arca equity platform and is an example of an inverse leveraged ETN. The NYSE Arca equity platform also lists several other inverse leveraged ETNs for trading.⁵

Currently, NYSE Arca Options Rule 5.3 provides that securities deemed appropriate for options trading shall include shares or other securities ("Equity Index-Linked Securities," "Commodity-Linked Securities," "Currency-Linked Securities," "Fixed Income Index-Linked Securities," "Futures-Linked Securities," and "Multifactor Index-Linked Securities," collectively known as "Index-Linked Securities"), as defined in NYSE Arca Equities Rule 5.2(j)(6), that are principally traded on a national securities exchange and an "NMS stock" (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934), and represent ownership of a security that provides for the payment at maturity, as described below:

- Equity Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities ("Equity Reference Asset");
- Commodity-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options on commodities, or other commodity derivatives or Commodity-Based Trust Shares or a basket or index of any of the foregoing ("Commodity Reference Asset");
- Currency-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more currencies, or options on currencies or currency futures or other currency derivatives or Currency Trust Shares (as defined in NYSE Arca Equities Rule 8.202(c)), or a basket or index of any of

⁴ The amendments proposed herein are similar to changes approved for the Chicago Board Options Exchange ("CBOE"). See Securities Exchange Act Release No. 63202 (October 28, 2010), 75 FR 67794 (November 3, 2010) (SR-CBOE-2010-080).

⁵ These ETNs include the Barclays Short B Leveraged Inverse S&P 500 TR ETN ("BXDB"), the Barclays Short C Leveraged Inverse S&P 500 TR ETN ("BXDC") and the Barclays Short D Leveraged Inverse S&P 500 TR ETN ("BXDD").

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a *et seq.*

³ 17 CFR 240.19b-4.

the foregoing ("Currency Reference Asset");

- **Fixed Income Index-Linked Securities** are securities that provide for the payment at maturity of a cash amount based on the performance of one or more notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing ("Fixed Income Reference Asset");

- **Futures-Linked Securities** are securities that provide for the payment at maturity of a cash amount based on the performance of an index of: (a) Futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b); or (c) CBOE Volatility Index ("VIX") futures ("Futures Reference Asset"); and

- **Multifactor Index-Linked Securities** are securities that provide for the payment at maturity of a cash amount based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, or Futures Reference Assets ("Multifactor Reference Asset").

For purposes of NYSE Arca Options Rule 5.3(j), Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, Futures Reference Assets, and Multifactor Reference Assets collectively are referred to as "Reference Assets."

In addition, Index-Linked Securities must meet the criteria and guidelines for underlying securities set forth in NYSE Arca Options Rule 5.3 or the Index-Linked Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset. In addition, the issuing company is obligated to issue or repurchase the securities in aggregation units for cash, or cash equivalents, satisfactory to the issuer of the Index-Linked Securities that underlie the option as described in the Index-Linked Securities prospectus.

The Exchange proposes to amend NYSE Arca Options Rule 5.3 to expand the type of Index-Linked Securities that may underlie options to include

leveraged (multiple or inverse) ETNs. To effect this change, the Exchange proposes to amend NYSE Arca Options Rule 5.3(j) by adding the phrase, "or the leveraged (multiple or inverse) performance" to each of the subparagraphs ((A) through (F)) in that section, which sets forth the different eligible Reference Assets.⁶

The Exchange's current continuing listing standards for ETN options will continue to apply. Specifically, under NYSE Arca Options Rule 5.4(m), ETN options shall not be deemed to meet the Exchange's requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering such Index-Linked Securities whenever the underlying securities are delisted and trading in the Index-Linked Securities is suspended on a national securities exchange, or the Index-Linked Securities are no longer an "NMS stock" (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934). In addition, the Exchange shall consider the suspension of opening transactions in any series of options of the class covering Index-Linked Securities in any of the following circumstances: (1) The underlying Index-Linked Security fails to comply with the terms of NYSE Arca Options Rule 5.3(j); (2) in accordance with the terms of NYSE Arca Options Rule 5.4(b), in the case of options covering Index-Linked Securities when such options were approved pursuant to NYSE Arca Options Rule 5.3(j), except that, in the case of options covering Index-Linked Securities approved pursuant to NYSE Arca Options Rule 5.3(j)(3)(B) that are redeemable at the option of the holder at least on a weekly basis, then option contracts of the class covering such Securities may only continue to be open for trading as long as the Securities are listed on a national securities exchange and are "NMS stock" as defined in Rule 600 of Regulation NMS; (3) in the case of any Index-Linked Security trading pursuant to NYSE Arca Options Rule 5.3(j), the value of the Reference Asset is no longer calculated or available or (4) such other event shall occur or condition exist that in the opinion of the Exchange make further dealing in such options on the Exchange inadvisable. Expanding the eligible types of ETNs for options trading under NYSE Arca Options Rule 5.3 will not have any

effect on the rules pertaining to position and exercise limits⁷ or margin.⁸

This proposal is necessary to enable the Exchange to list and trade options on shares of BXUB, BXUC, XXV, BXDB, BXDC, BXDD and MLPL. The Exchange believes the ability to trade options on leveraged (multiple or inverse) ETNs will provide investors with greater risk management tools. The proposed amendment to the Exchange's listing criteria for options on ETNs is necessary to ensure that the Exchange will be able to list options on the above listed leveraged (multiple and inverse) ETNs as well as other leveraged (multiple and inverse) ETNs that may be introduced in the future.

The Exchange represents that its existing surveillance procedures applicable to trading in options are adequate to properly monitor the trading in leveraged (multiple and inverse) ETN options.

It is expected that The Options Clearing Corporation will seek to revise the Options Disclosure Document to accommodate the listing and trading of leveraged (multiple and inverse) ETN options.

Broaden the Definition of "Futures-Linked Securities"

The second change proposed by this filing is to amend the definition of "Futures-Linked Securities" set forth in NYSE Arca Options Rule 5.3(j)(1)(E). Currently, the definition of "Futures-Linked Securities" is limited to securities that provide for the payment at maturity of a cash amount based on the performance of an index of: (a) futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; (b) interest rate futures or options or derivatives on the foregoing; or (c) CBOE VIX futures.

NYSE Arca Options Rule 5.3 sets forth generic listing criteria for securities that may serve as underlyings for listed options trading. The Exchange believes that the current definition of "Futures-Linked Securities" is unnecessarily restrictive and requires the Exchange to submit a filing to amend the definition each time a new ETN is issued that tracks the performance of an index of futures/options on futures that is not enumerated in the existing rule. To address this issue, the Exchange is proposing to revise the definition of "Futures-Linked Securities" to provide that they are securities that provide for the payment at maturity of a cash

⁶ The Exchange also proposes a technical correction to the Rule to conform a definition. In particular, we are changing the defined term "NMS Stock" to "NMS stock" to conform to how it is defined in Rule 600 of Regulation NMS under the Securities and Exchange Act of 1934.

⁷ See Rules 5.15, Position Limits, and 5.18, Exercise Limits.

⁸ See Rule 5.25, Margins.

amount based on the performance or the leveraged (multiple or inverse) performance of an index or indexes of futures contracts or options or derivatives on futures contracts ("Futures Reference Asset"). The Exchange notes that all ETNs eligible for options trading must be principally traded on a national securities exchange and an "NMS stock." As a result, the Exchange believes that broadening the definition of "Futures-Linked Securities" by no longer specifically listing the types of futures and options on futures contracts that may be tracked by an ETN is appropriate.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed rules applicable to trading pursuant to generic listing and trading criteria serve to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule

change has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay so that the Exchange can list and trade options on leveraged (multiple or inverse) ETNs and implement the amended definition of "Futures-Linked Securities" immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.¹³ The Commission notes the proposal is substantively identical a proposal that was recently approved by the Commission, and does not raise any new regulatory issues.¹⁴ For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File

Number SR-NYSEArca-2010-115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2010-115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.¹⁵ All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2010-115 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon,
Deputy Secretary.

[FR Doc. 2010-31994 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

¹³ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ See *supra* note 4.

¹⁵ The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov>.

¹⁶ 17 CFR 200.30-3(a)(12).

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63537; File No. SR-NYSEAmex-2010-110]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 123C—NYSE Amex Equities To Clarify That Exchange Systems Enforce Rule 123C With Respect to Market At-The-Close and Limit At-The-Close Order Entry After 3:45 p.m.

December 14, 2010.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”) and Rule 19b-4 thereunder,² notice is hereby given that on December 6, 2010, NYSE Amex LLC (the “Exchange” or “NYSE Amex”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 123C—NYSE Amex Equities to clarify that Exchange systems enforce Rule 123C with respect to Market At-The-Close (“MOC”) and Limit At-The-Close (“LOC”) order entry after 3:45 p.m. The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and <http://www.nyse.com>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend Rule 123C—NYSE Amex Equities to clarify that Exchange systems enforce Rule 123C with respect to MOC³ and LOC⁴ order entry after 3:45 p.m.

Rule 123C governs certain closing procedures on the Exchange, including MOC, LOC and CO order entry, cancellation of such orders and the calculation and publication of imbalances. In particular, Rule 123C(2)(b) currently provides that MOC/LOC interest may be entered after 3:45 p.m. only to offset a Mandatory MOC/LOC Imbalance Publication. The rule therefore suggests that members or member organizations entering MOC or LOC orders are actively responsible for compliance therewith (e.g., “orders may be entered”). However, Exchange systems enforce compliance with this rule pursuant to system functionality that allows only the entry of offsetting MOC/LOC interest after 3:45 p.m. and blocks the entry of all MOC/LOC orders that would join the same side of a published MOC/LOC imbalance and the entry of MOC/LOC orders after 3:45 p.m. for securities for which there has not been a Mandatory MOC/LOC Imbalance Publication.⁵ Exchange systems also enforce compliance with this rule pursuant to system functionality that allows or blocks, depending upon the circumstances, MOC/LOC order entry in the event of a Trading Halt.

The Exchange proposes to amend Rule 123C(2) and (3) generally to clarify that Exchange systems enforce compliance with the rules, and therefore clarify that members and member organizations are not responsible for ensuring compliance with this aspect of the rule.

The Exchange proposes additional clean-up amendments to Rule 123C. Specifically, the Exchange proposes to

³ A MOC order is a market order in a security that, by its terms, is to be executed in its entirety at the closing price. If not executed due to tick restrictions or a trading halt, the order will be cancelled. See Rule 13—NYSE Amex Equities (Definitions of Orders).

⁴ A LOC order is a limit order in a security that is entered for execution at the closing price of the security on the Exchange provided that the closing price is at or within the specified limit. If not executed due to a trading halt or because, by its terms it is not marketable at the closing price, the order will be cancelled. See Rule 13—NYSE Amex Equities (Definitions of Orders).

⁵ See Information Memos 09-12 and 10-11, respectively.

delete certain text in Rule 123C(2)(b)(ii)⁶ and 123C(2)(c)(iii)⁷ pertaining to a “no imbalance” notification after dissemination of an Informational Imbalance as well as the text of current Rule 123C(2)(b)(iii), because these provisions are no longer necessary due to the system-enforced compliance with MOC/LOC order entry. In addition, the Exchange proposes to amend Rule 123C(3)(c) to clarify that Exchange systems will reject cancellations of MOC, LOC and CO orders after 3:58 p.m. and to add a reference to Rule 123C(9), which pertains to alternative procedures in the case of extreme order imbalances at the close.

Because the Exchange previously disclosed this system functionality to member organizations, the Exchange believes that this rule proposal would not require technical programming and/or modification by members or member organizations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the changes proposed herein would reflect that Exchange systems enforce compliance with Rule 123C(2) and (3) and therefore clarify that Exchange members and member organizations are not responsible for ensuring such compliance.

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁶ See email from Clare F. Saperstein, Vice President, Regulatory Policy and Management, NYSE Regulation, Inc., to Nathan Saunders, Special Counsel, Division of Trading and Markets, Commission, dated December 10, 2010 (amending the proposed rule change by replacing the reference to “Rule 123C(2) and (3)” with “Rule 123C(2)(b)(ii) and 123C(2)(c)(iii)”).

⁷ See *id.*

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act¹⁰ and Rule 19b-4(f)(1) thereunder,¹¹ because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. Specifically, the change proposed herein would reflect that Exchange systems enforce compliance with Rule 123C(2) and (3) and therefore clarify that Exchange members and member organizations are not responsible for ensuring such compliance.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAmex-2010-110 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2010-110. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAmex-2010-110 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon,
Deputy Secretary.

[FR Doc. 2010-31926 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63545; File No. SR-NYSE-2010-82]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend for 12 Months the Pilot Program Permitting the Exchange's Ownership Interest in BIDS Holdings L.P. (BIDS) and the Affiliation of BIDS With the New York Block Exchange LLC

December 14, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹³ and Rule 19b-4 thereunder,² notice is hereby given that, on December 9, 2010, the New York Stock Exchange LLC ("NYSE" or the "Exchange") filed

with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend for an additional 12 months the January 22, 2011 expiration date of the pilot program that provides an exception to NYSE Rule 2B by permitting the Exchange's equity ownership interest in BIDS Holdings L.P. ("BIDS"), which is the parent company of a member of the Exchange, and BIDS's affiliation with the New York Block Exchange LLC, an affiliate of the Exchange. There is no proposed rule text.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

On January 22, 2009, the Commission approved the governance structure proposed by the Exchange with respect to the New York Block Exchange ("NYBX"), a new electronic trading facility of the Exchange for NYSE-listed securities that was established by means of a joint venture between the Exchange and BIDS.³ The governance structure that was approved is reflected in the Limited Liability Company Agreement of New York Block Exchange LLC (the "Company"), the entity that owns and operates NYBX. Under the governance structure approved by the Commission, the Exchange and BIDS each own a 50% economic interest in the Company. In

¹⁰ 15 U.S.C. 78s(b)(3)(A)(i).

¹¹ 17 CFR 240.19b-4(f)(1).

¹² 17 CFR 200.30-3(a)(12).

¹³ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (order approving SR-NYSE-2008-120) ("Approval Order").

addition, the Exchange, through its wholly-owned subsidiary NYSE Market, Inc., owns less than 10% of the aggregate limited partnership interest in BIDS. BIDS is the parent company of BIDS Trading, L.P. ("BIDS Trading"), which became a member of the Exchange in connection with the establishment of NYBX.

The foregoing ownership arrangements would violate NYSE Rule 2B without an exception from the Commission.⁴ First, the Exchange's indirect ownership interest in BIDS Trading violates the prohibition in Rule 2B against the Exchange maintaining an ownership interest in a member organization. Second, BIDS Trading is an affiliate of an affiliate of the Exchange,⁵ which violates the prohibition in Rule 2B against a member of the Exchange having such status. Consequently, in the Approval Order, the Commission permitted an exception to these two potential violations of NYSE Rule 2B, subject to a number of limitations and conditions. One of the conditions for Commission approval was that the proposed exception from NYSE Rule 2B to permit NYSE's indirect ownership/interest in BIDS Trading and BIDS Trading's affiliation with the Company (which is an affiliate of NYSE) would be for a pilot period of 12 months.⁶

In discussing the pilot basis of the exception to NYSE Rule 2B, the Approval Order noted that the pilot period "will provide NYSE and the Commission an opportunity to assess whether there might be any adverse consequences of the exception and whether a permanent exception is warranted."⁷ The original 12-month pilot period expired on January 22, 2010 and was extended for an additional 12 months to January 22, 2011 by a rule filing made by the Exchange on January 11, 2010 and noticed in a release by the Commission dated January 22, 2010.⁸

⁴ NYSE Rule 2B provides, in relevant part, that: "[w]ithout prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange." * * * The term affiliate shall have the meaning specified in Rule 12b-2 under the Act."

⁵ Specifically, the Company is an affiliate of the Exchange, and BIDS Trading is an affiliate of the Company based on their common control by BIDS. The affiliation in each case is the result of the 50% ownership interest in the Company by each of the Exchange and BIDS.

⁶ See Approval Order, 74 FR at 5018.

⁷ *Id.* at 5019.

⁸ See Securities Exchange Act Release No. 61409 (January 22, 2010), 75 FR 4889 (January 29, 2010) (File No. SR-NYSE-2010-04).

While the Exchange believes that the experience to date operating under the exception to Rule 2B fully justifies making the exception permanent, the Exchange now seeks to extend the ending date for the pilot program for another 12 months to January 22, 2012 to allow additional time, if necessary, for the Commission to obtain and review the information it needs in order to make its determination regarding any adverse consequences of the exception and whether a permanent exception is warranted. During the proposed extension of the pilot program period, the Exchange's current indirect ownership interest in BIDS Trading⁹ and BIDS Trading's affiliation with the Company would continue to be permitted.

If the Commission should determine prior to the end of the extended pilot period that a permanent exception to NYSE Rule 2B is warranted, the Exchange would have the option of submitting a proposed rule change to accomplish this and simultaneously terminate the pilot program.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)¹⁰ of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(1)¹² of the Act, which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The Exchange further believes that the proposed rule change is also consistent with, and furthers the objectives of, Section 6(b)(5)¹³ of the Act, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system

⁹ Another condition for the exception to NYSE Rule 2B specified in the Approval Order was that the Exchange's equity interest in BIDS must remain less than 9%, absent prior Commission approval of any increase. *See id.* at 5018. Subsequently, the Commission approved a proposal by the Exchange to slightly increase the ceiling on its equity ownership in BIDS to less than 10%, and that will be the applicable limitation during the extension of the pilot period. *See* Securities Exchange Act Release No. 61257 (December 30, 2009), 75 FR 500 (January 5, 2010) (order approving SR-NYSE-2009-116).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78.

¹² 15 U.S.C. 78f(b)(1).

¹³ 15 U.S.C. 78f(b)(5).

and, in general, to protect investors and the public interest.

In the Approval Order, the Commission determined that the proposed exception from NYSE Rule 2B to permit NYSE's indirect ownership interest in BIDS Trading and BIDS Trading's affiliation with the Company was consistent with the Act, including Section 6(b)(5) thereof.¹⁴ As the basis for its determination, the Commission cited the specific limitations and conditions listed in the Approval Order to which its approval of the exception to NYSE Rule 2B was subject,¹⁵ stating: "These conditions appear reasonably designed to mitigate concerns about potential conflicts of interest and unfair competitive advantage. * * * These conditions appear reasonably designed to promote robust and independent regulation of BIDS. * * * The Commission believes that, taken together, these conditions are reasonably designed to mitigate potential conflicts between the Exchange's commercial interest in BIDS and its regulatory responsibilities with respect to BIDS."¹⁶ Because these same limitations and conditions will continue to be applicable during the additional extension of the pilot period, other than the ending date of the pilot period and the aforementioned small increase in the ceiling on the Exchange's equity interest in BIDS, the Exchange believes that the exception from NYSE Rule 2B described above will continue to be consistent with the Act during that extension.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposal has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder because it does not: (i) Significantly affect the protection of

¹⁴ *See* Approval Order, 74 FR at 5018-5019.

¹⁵ *Id.* at 5018.

¹⁶ *Id.* at 5019.

investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.¹⁷

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2010-82 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2010-82. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the

public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2010-82 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010-31931 Filed 12-20-10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63553; File No. SR-NYSEAmex-2010-119]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC To Establish Royalty Fees for Non-Customer Executions in Options Based on the KBW Bank Index

December 15, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that, on December 10, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to establish royalty fees for non-Customer executions in options based on the KBW Bank Index, symbol BKX. The text of the proposed rule change is available on

the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office, on the Commission's Web site at <http://www.sec.gov>, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Schedule of Fees and Charges ("Fee Schedule") to implement new royalty fees of \$0.10 per contract associated with executions in options based on the KBW Bank Index (BKX). The fees are intended to be effective on Monday, December 13, 2010 when the Exchange expects to commence trading of these options. The Exchange has entered into a licensing agreement with Keefe, Bruyette & Woods, Inc. ("KBW"), the firm that created and maintains the index, and will pay a fee to KBW on every contract traded on the Exchange. As with other royalty fees charged by the Exchange, these fees reflect the pass-through charges associated with the licensing of this product. The Exchange notes that royalty fees do not apply to public Customer orders in these products.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,³ in general, and Section 6(b)(4) of the Act,⁴ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The proposed changes to the Fee Schedule are equitable in that they apply uniformly

¹⁷ In addition, Rule 19b-4(f)(6) requires the Exchange to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange satisfied this requirement.

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78f.

⁴ 15 U.S.C. 78f(b)(4).

to all similarly situated Exchange participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act⁵ and subparagraph (f)(2) of Rule 19b-4 thereunder,⁶ because it establishes a due, fee, or other charge imposed by NYSE Amex.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAmex-2010-119 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2010-119. This file number should be included on

the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAmex-2010-119 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Florence E. Harmon,
Deputy Secretary.

[FR Doc. 2010-31950 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63554; File No. SR-ISE-2010-115]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Regarding Registration and Qualification Requirements for Associated Persons

December 15, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 1, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and

Exchange Commission the proposed rule change, as described in Items I and II below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its rules to amend its rules [sic] regarding the registration of associated persons. The text of the proposed rule change is provided below (*italics* indicate additions; [brackets] indicate deletions):

Rule 313. Registration Requirements

(a) Registration of Individual Associated Persons Engaged in the Securities Business.

(1) Individual associated persons engaged or to be engaged in the securities business of a Member shall be registered with the Exchange in the category of registration appropriate to the function to be performed as prescribed by the Exchange. Before the registration can become effective, the individual associated person shall submit the appropriate application for registration, pass a qualification examination appropriate to the category of registration as prescribed by the Exchange and submit any required registration and examination fees. A Member shall not maintain a registration with the Exchange for any person (1) who is no longer active in the Member's securities business; (2) who is no longer functioning in the registered capacity; or (3) where the sole purpose is to avoid an examination requirement. A Member shall not make application for the registration of any person where there is no intent to employ that person in the Member's securities business. A Member may, however, maintain or make application for the registration of an individual who performs legal, compliance, internal audit, back-office operations, or similar responsibilities for the Member, or a person who performs administrative support functions for registered personnel, or a person engaged in the securities business of a foreign securities affiliate or subsidiary of the Member.

(2) Persons Exempt from Registration. The following individual associated persons of Members are exempt from the registration requirements set forth in paragraph (1):

(A) individual associated persons whose functions are solely and exclusively clerical or ministerial;

⁵ 15 U.S.C. 78s(b)(3)(A).

⁶ 17 CFR 240.19b-4(f)(2).

⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(B) individual associated persons who are not actively engaged in the securities business;

(C) individual associated persons whose functions are related solely and exclusively to the Member's need for nominal corporate officers or for capital participation;

(D) individual associated persons whose functions are related solely and exclusively to:

(i) transactions in commodities;
(ii) transactions in security futures;
and/or
(iii) effecting transactions on the floor of another national securities exchange and who are registered as floor members with such exchange.

(b) *Financial/Operations Principal.* Each Member subject to Exchange Act Rule 15c3-1 shall designate a Financial/Operations Principal. The duties of a Financial/Operations Principal shall include taking appropriate actions to assure that the Member complies with applicable financial and operational requirements under the Rules and the Exchange Act, including but not limited to those requirements relating to the submission of financial reports and the maintenance of books and records. Each Financial/Operations Principal is required to have successfully completed the Financial and Operations Principal Examination (Series 27 Exam). Each Financial/Operations Principal designated by a Trading Member shall be registered in that capacity with the Exchange as prescribed by the Exchange. A Financial/Operations Principal of a Member may be a full-time employee, a part-time employee or independent contractor of the Member.

(c) *Chief Compliance Officer.* Each Member shall designate a Chief Compliance Officer on Schedule A of Form BD. An individual designated as a Chief Compliance Officer is required to register with the Exchange and pass the appropriate heightened qualification examination(s) as prescribed by the Exchange. A person who has been designated as a Chief Compliance Officer on Schedule A of Form BD for at least two years immediately prior to January 1, 2002, and who has not been subject within the last ten years to any statutory disqualification as defined in Section 3(a)(39) of the Act; a suspension; or the imposition of a fine of \$5,000 or more for a violation of any provision of any securities law or regulation, or any agreement with, rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such regulatory or self-regulatory organization in connection with a disciplinary proceeding shall be

required to register in the category of registration appropriate to the function to be performed as prescribed by the Exchange, but shall be exempt from the requirement to pass the heightened qualification examination as prescribed by the Exchange.

(d) *Registration Required Under Chapter 6.* Individual associated persons of a Member that conduct a public customer business must also comply with the registration requirements set forth in Rule 601 and Rule 602. These additional registration categories include: (i) Registered Options Principal; and (ii) Registered Representative.

(e) *Requirement for Examination on Lapse of Registration.* Any person whose registration has been revoked by the Exchange as a disciplinary sanction or whose most recent registration has been terminated for two or more years immediately preceding the date of receipt by the Exchange of a new application shall be required to pass a qualification examination appropriate to the category of registration as prescribed by the Exchange.

Supplementary Material to Rule 313

.01 Each individual required to register under this Rule shall electronically file a Uniform Application for Securities Industry Registration ("Form U4") through the Central Registration Depository system ("Web CRD") operated by the Financial Industry Regulatory Authority, Incorporated ("FINRA").

.02 Each individual required to register under this Rule shall electronically submit to Web CRD any required amendments to Form U4.

.03 Any Member that discharges or terminates the employment or retention of an individual required to register under this Rule shall comply with the termination filing requirements set forth in Rule 601(c) and Rule 603, which include the filing of a Form U5.

.04 Each individual required to register under this Rule is required to satisfy the continuing education requirements set forth in Rule 604 or any other applicable continuing education requirements as prescribed by the Exchange.

.05 The Exchange may, in exceptional cases and where good cause is shown, waive the applicable qualification examination and accept other standards as evidence of an applicant's qualifications for registration. Advanced age or physical infirmity will not individually of themselves constitute sufficient grounds to waive a qualification examination. Experience in fields ancillary to the

securities business may constitute sufficient grounds to waive a qualification examination.

.06 For purposes of paragraph (a)(1) above, the Exchange shall consider an individual associated person to be engaged in the securities business of a Member if:

(a) the individual associated person engages in one or more of the following activities on behalf of the Member:

(1) proprietary trading;
(2) market-making;
(3) effecting transactions on behalf of a broker-dealer;
(4) supervision or monitoring of proprietary trading, market-making, or brokerage activities;
(5) supervision or training of those engaged in proprietary trading, market-making, or brokerage activities with respect to those activities; or

(b) the individual associated person engages in the management of one or more of the activities enumerated in subparagraphs (1) through (5) above as an officer, partner or a director.

.07 Each Member must register with the Exchange each individual acting in any of the following capacities: (i) officer; (ii) partner; (iii) director; (iv) supervisor of proprietary trading, market-making or brokerage activities; and/or (v) supervisor of those engaged in proprietary trading, market-making or brokerage activities with respect to those activities. Each Member must register with the Exchange at least two individuals acting in one or more of the capacities described in (i)-(v) above. The Exchange may waive this requirement if a Member demonstrates conclusively that only one individual acting in one or more of the capacities described in (i) through (v) above should be required to register. A Member that conducts proprietary trading only and has 25 or fewer registered persons shall only be required to have one officer or partner who is registered in this capacity.

For purposes of this Supplementary Material .07 to Rule 313, a Member shall be considered to conduct only proprietary trading if the Member has the following characteristics:

(a) The Member is not required by Section 15(b)(8) of the Exchange Act to become a FINRA member but is a member of another registered securities exchange not registered solely under Section 6(g) of the Exchange Act;

(b) All funds used or proposed to be used by the Member are the Trading Member's own capital, traded through the Member's own accounts;

(c) The Member does not, and will not, have customers; and

(d) All persons registered on behalf of the Member acting or to be acting in the capacity of a trader must be owners of, employees of, or contractors to the Member.

Rule 601. Registration of Options Principals

(a) No change.

(b) In connection with their registration, Options Principals shall electronically file a Uniform Application for Securities Industry Registration or Transfer ("Form U4") [with] *through the Central Registration Depository system ("Web CRD") [System] operated by the Financial Industry Regulatory Authority, Incorporated ("FINRA")*, shall successfully complete an examination prescribed by the Exchange for the purpose of demonstrating an adequate knowledge of the options business and of the Rules of the Exchange, and shall further agree in the U4 filing to abide by the Constitution and Rules of the Exchange and the Rules of the Options Clearing Corporation. Any person required to complete Form U4 shall promptly electronically file any required amendments to Form U4 [with the] *through Web CRD*.

(c) Termination of employment or affiliation of any Options Principal in such capacity shall be promptly electronically reported [to the] *through Web CRD* together with a brief statement of the reason for such termination on [Form U5] *a Uniform Termination Notice for Securities Industry Registration ("Form U5")*.

(d) and (e) no change.

Rule 602. Registration of Representatives

(a) and (b) no change

(c) In connection with their registration, Representatives shall electronically file a [Uniform Application for Securities Industry Registration or Transfer (Form U4) with the NASD's] *Form U4 through Web CRD [System]* by appropriately checking the ISE as a requested registration on the electronic U4 filing, and shall successfully complete an examination for the purpose of demonstrating an adequate knowledge of the securities business, and shall further agree in the U4 filing to abide by the Constitution and Rules of the Exchange and the Rules of the Clearing Corporation. Any person required to complete Form U4 shall promptly electronically file any required amendments to Form U4 [with the NASD's] *through Web CRD [System]*.

(d) no change.

Rule 603. Termination of Registered Persons

(a) The discharge or termination of employment of any registered person, together with the reasons therefore, shall be electronically reported [to the NASD's] *through Web CRD [System]*, by a Member immediately following the date of termination, but in no event later than thirty (30) days following termination on *Form U5 [a Uniform Termination Notice for Securities Industry Registration (Form U-5)]*. A copy of said termination notice shall be provided concurrently to the person whose association has been terminated.

(b) The Member shall electronically report [to the NASD's] *through Web CRD [System]*, by means of an amendment to the Form [U-5] *U5* filed pursuant to paragraph (a) above, in the event that the Member learns of facts or circumstances causing any information set forth in the notice to become inaccurate or incomplete. Such amendment shall be provided concurrently to the person whose association has been terminated no later than thirty (30) days after the Member learns of the facts or circumstances giving rise to the amendment.

Rule 604. Continuing Education for Registered Persons

(a) no change.

(b) *In-house Delivery of Regulatory Element: Members will be permitted to administer the Regulatory Element of the Continuing Education program to their registered persons by instituting a firm program acceptable to the Exchange. The following procedures are required:*

(1) Senior Officer or Partner in Charge. The Member has designated a senior officer or partner to be responsible for the firm's delivery of the Regulatory Element of the Continuing Education program.

(2) Site Requirements. The location of all delivery sites will be under the control of the Member. Delivery of Regulatory Element continuing education will take place in an environment conducive to training (i.e., a training facility, conference room or other area dedicated to this type of purpose would be appropriate. Inappropriate locations would include a personal office or any location that is not or cannot be secured from traffic and interruptions). Where multiple delivery terminals are placed in a room, adequate separation between terminals will be maintained.

(3) Technology Requirements. The communication links and firm delivery computer hardware must comply with standards defined by the Exchange or its designated vendor.

(4) Supervision. The Member's written supervisory procedures must contain the procedures implemented to comply with the requirements of its delivery of Regulatory Element continuing education. The Member's written supervisory procedures must identify the senior officer or partner designated pursuant to paragraph (b)(1) above and contain a list of individuals authorized by the Member to serve as a proctor. Member locations for delivery of Regulatory Element continuing education will be specifically listed in the Member's written supervisory procedures.

(5) Proctors. All sessions will be proctored by an authorized person during the entire Regulatory Element continuing education session. Proctors must be present in the session room or must be able to view the person(s) sitting for Regulatory Element continuing education through a window or by video monitor. The individual responsible for proctoring at each administration will sign a certification that required procedures have been followed, that no material from Regulatory Element continuing education has been reproduced, and that no candidate received any assistance to complete the session. Such certification may be a part of the sign-in log required under paragraph (b)(6) below. Individuals serving as proctors must be individuals registered with the Exchange as "proctors" and supervised by the designated senior officer/partner for purposes of Member delivery of Regulatory Element continuing education. Proctors will check and verify the identification of all individuals taking Regulatory Element continuing education.

(6) Administration. All appointments will be scheduled in advance using the procedures and software specified by the Exchange, its agent or designated vendor to communicate with the Proctor system and the NASD's CRD System. The Member/proctor will conduct each session in accordance with the administrative and appointment scheduling procedures required by the Exchange or its designated vendor.

A sign-in log will be maintained at the delivery facility. Logs will contain the date of each session, the name and social security number of the individual taking the session, that required identification was checked, the sign-in time, the sign-out time, and the name of the individual proctoring the session. Such logs are required to be retained pursuant to Securities Exchange Act of 1934 Rules 17a-3 and 17a-4. No material will be permitted to be utilized for the session nor any session-

related material be removed. Delivery sites will be made available for inspection by the SROs. Before commencing in-firm delivery of the Regulatory Element continuing education, Members are required to file with their Designated Examining Authority ("DEA"), a letter of attestation (as specified below) signed by a senior officer or partner, attesting to the establishment of required procedures addressing senior officer or partner in-charge, supervision, site, technology, proctors, and administrative requirements.

Letter of Attestation for In-Firm Delivery of Regulatory Element Continuing Education [Name of senior officer or partner] has established procedures for delivering Regulatory Element continuing education on its premises. I have determined that these procedures are reasonably designed to comply with SRO requirements pertaining to in-firm delivery of Regulatory Element continuing education, including that such procedures have been implemented to comply with senior officer or partner in-charge, supervision, site, technology, proctors, and administrative requirements.

Signature

Printed name

Title [Must be signed by a Principal Executive Officer (or Executive Representative) of the firm]

Date

(7) Annual Representation. Each Member will be required to represent to the Exchange, annually, that they have continued to maintain, and reasonably believe that they have complied with, all required procedures outlined in paragraphs (b)(1)-(b)(6) above for the previous year. Such attestation must be signed by a senior officer or partner.

(8) Definition of Senior Officer/ Partner. For purposes of paragraph (b) of this rule, "senior officer or partner" means the chief executive officer or managing partner or either (A) any other officer or partner who is a member of the Member's executive or management committee or its equivalent committee or group or (B) if the Member has no such committee or group, any officer or partner having senior executive or management responsibility who reports directly to the chief executive officer or managing partner. If the chief executive officer or managing partner does not sign the attestation, a copy of the

attestation shall be provided to the chief executive officer or managing partner.

[(b)] (c) Firm Element

(1) through (3) no change.

Supplementary Material to Rule 604

.01 For purposes of this Rule, the term "registered person" means any Member, Representative or other person registered or required to be registered under the Rules, but does not include any such person whose activities are limited solely to the transaction of business on the Exchange with Members or registered broker-dealers].

.02 through .04 no change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ISE is proposing to amend its rules regarding qualification, registration and continuing education of individual associated persons.³ Specifically, in response to a request by the Division of Trading and Markets of the U.S. Securities and Exchange Commission and in light of recent market events, the Exchange is proposing to expand its registration and qualification requirements to include additional types of individual associated persons. The Exchange believes the proposed rule changes are consistent with Rule 15b7-1,⁴ promulgated under the

³ Under ISE Rule 100(a)(3), the term "associated person" or "person associated with a Member" means any partner, officer, director or branch manager of Member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with a Member or any employee of a Member. This filing refers specifically to the classification of "individual associated persons" as an organization could fall within the scope of this definition, and it is not ISE's intention to require registration by an organization.

⁴ 17 CFR 240.15b7-1.

Securities Exchange Act of 1934, as amended ("Exchange Act"),⁵ which provides: "No registered broker or dealer shall effect any transaction in * * * any security unless any natural person associated with such broker or dealer who effects or is involved in effecting such transaction is registered or approved in accordance with the standards of training, experience, competence, and other qualification standards * * * established by the rules of any national securities exchange * * *".

Proposed Rule 313 establishes the qualification and registration requirements for associated persons of Members. This proposed rule also establishes registration requirements for a Chief Compliance Officer for each Member and for a Financial/Operations Principal for each Member subject to the Exchange Act Rule 15c3-1.⁶ Proposed Rule 313 also references the registration requirements set forth in Chapter 6 of the Exchange's Rulebook for associated persons of Members that conduct a public customer business.⁷

Under the proposal, individual associated persons acting in the capacity of a sole proprietor, officer, partner, director or Chief Compliance Officer will be subject to heightened qualification requirements. In addition, an individual associated person that is engaged in the supervision or monitoring of proprietary trading, market-making or brokerage activities and/or that is engaged in the supervision or training of those engaged in proprietary trading, market-making or brokerage activities with respect to those activities will be subject to heightened qualification requirements. The Exchange believes that the heightened qualification requirements should enhance the supervisory structure for Members that do not conduct a public customer business.⁸

Specifically, the Exchange is proposing to require additional associated persons to submit the appropriate application for registration online through the Central Registration

⁵ 15 U.S.C. 78a *et seq.*

⁶ 17 CFR 240.15c3-1.

⁷ These proposed rule changes are consistent with those recently adopted by the Chicago Board of Options Exchange. Securities Exchange Act Release No. 62977 (Sept. 22, 2010), 75 FR 59773 (Sept. 28, 2010) ("CBOE Registration Proposal"); Securities Exchange Act Release No. 63314 (November 12, 2010), 75 FR 70957 (November 19, 2010) ("CBOE Approval Order").

⁸ Proposed Rule 313 specifies that individual associated persons, including Registered Options Principals and Registered Representatives, are also subject to the registration requirements set forth in Chapter 6 of ISE's Rules, which is generally applicable to Members that conduct a public customer business.

Depository system ("Web CRD"), which is operated by the Financial Industry Regulatory Authority, Incorporated ("FINRA"), successfully complete any qualification examination(s) as prescribed by the Exchange and submit any required registration and examination fees.⁹ Proposed Rule 313 will require registration and qualification by individual associated persons engaged or to be engaged in the securities business of a Member.¹⁰ An individual associated person will be considered to be a person engaged in the securities business of a Member if (i) the individual associated person conducts proprietary trading, acts as a market-maker, effects transactions on behalf of a broker-dealer account, supervises or monitors proprietary trading, market-making or brokerage activities on behalf of the broker-dealer, supervises or conducts training for those engaged in proprietary trading, market-making or brokerage activities on behalf of a broker-dealer account; or (ii) the individual associated person engages in the management of any individual associated person identified in (i) above as an officer, partner or director.¹¹

ISE will require all associated persons required to register under proposed Rule 313 that are not already registered in Web CRD to register (*i.e.*, complete a Form U4) within 60 days of the approval date of this filing by the U.S. Securities and Exchange Commission.¹² With respect to the examination requirement associated with the proposed rule,¹³ ISE is working with other self-regulatory organizations ("SROs") to develop an additional examination for associated persons who previously may not have been required to register under applicable SRO rules (*e.g.*, proprietary options traders) that may be used as an alternative to the

existing categories of registration.¹⁴ The Exchange will notify its Members via regulatory circular what qualification examination(s) will be acceptable for compliance with the requirements proposed in Rule 313.

The Exchange is proposing to identify in Rule 313 several categories of persons that are exempt from these additional registration requirements. The categories of individual associated persons that are exempt from the registration requirements include (i) Individual associated persons functioning solely and exclusively in a clerical or ministerial capacity; (ii) individual associated persons that are not actively engaged in the securities business, (iii) individual associated persons functioning solely and exclusively to meet a need for nominal corporate officers or for capital participation; and (iv) individual associated persons whose functions are solely and exclusively related to transactions in commodities, transactions in security futures and/or effecting transactions on the floor of another national securities exchange and who are registered as floor members with such exchange. The Exchange believes these registration exemptions are appropriate because ISE would not consider individuals that fall into the exemptions to be actively engaged in securities business unless they are registered as floor members on another national securities exchange, in which case, they are already registered as floor members and not required to register at ISE. ISE believes incorporating these exemptions into the rule provides additional clarity to individual associated persons as to who will or will not be required to register under the proposed rule. Any applicable FINRA

registration requirements would continue to apply to Members that are also members of FINRA.

Additionally, under the proposal, the Exchange may waive the qualification examination requirement where good cause is shown. Similar rules are in place at the New York Stock Exchange, Inc. ("NYSE") and FINRA.¹⁵ In determining whether a waiver shall be granted, the Exchange shall consider, among other things, previous industry employment, training and/or the successful completion of similar qualification examinations of other self-regulatory organizations. Under the proposed Rule, individual associated persons whose activities are limited solely to the transaction of business on the floor of another exchange will be subject to the continuing education requirements set forth in Rule 604 or any other continuing education requirements as prescribed by the Exchange.

The Exchange also is proposing to require the designation of a Financial/Operations Principal by each member that is subject to Exchange Act Rule 15c3-1, and the designation of a Chief Compliance Officer by each Member. Under the proposed rule, the Financial/Operations Principal and Chief Compliance Officer are required to register and pass the appropriate qualification examination.¹⁶ The registration requirements for a Financial/Operations Principal are consistent with CBOE Rule 3.6A,¹⁷ and the requirements for a Chief Compliance Officer are consistent with proposed amendments to CBOE Rule 3.6A (which in turn are consistent with FINRA Rule 3130 and NASD Rule 1022).¹⁸ The proposal includes a limited exemption from the requirement to pass the appropriate qualification examination by a Chief Compliance Officer. Specifically, a person that has been

⁹ Under the proposal, each individual associated person subject to the registration requirements in Rule 313 will be required to electronically file a Uniform Application for Securities Industry Registration ("Form U4") through Web CRD.

¹⁰ An individual with an indirect ownership interest in a Member that is engaged in the securities business of such Member is required to register under proposed Rule 313.

¹¹ This requirement is consistent with FINRA's registration requirement for "Principals" (as defined in NASD Rule 1021). ISE is declining to adopt the term "Principal" in the Exchange proposed rule change to avoid confusion with existing terms, such as "Option Principal."

¹² Web CRD has been enhanced by FINRA to allow for general registration of applicable associated persons.

¹³ The availability of the appropriate category on Web CRD for any new qualification examinations recognized by the Exchange may be subject to the timing for any required systems development on Web CRD.

¹⁴ ISE intends to develop with other SROs, within six months of the approval date of this filing, an alternative qualification examination(s) that is appropriate for the additional individual associated persons required to register under the proposed rule. Once the development of this examination(s) has been completed, the implementation and effective date will be subject to approval by the Commission and any necessary systems development schedules to implement the examination. If an alternative examination(s) is not completed within six months of the approval date of this filing, the Exchange will establish a deadline for qualification based on the existing categories of registration and qualification examinations available on Web CRD, until such time as the development and implementation of an alternative examination(s) has been completed. The referenced categories of registration available on Web CRD include, but may not be limited to, the General Securities Representative (GS) and General Securities Principal (GP), as applicable to the type of business activities conducted. The accompanying qualification examination for the General Securities Representative is the Series 7 and the accompanying qualification examination for the General Securities Principal is the Series 24.

¹⁵ See NASD Rule 1070 (Qualification Examinations and Waiver of Requirements) and NYSE Rule 345 (Employees—Registration, Approval, Records).

¹⁶ The appropriate qualification examination for a Financial/Operations Principal is the Series 27 exam. The appropriate qualification examination for a Chief Compliance Officer is the Series 14 exam. ISE is working with FINRA to establish this category of registration and make the accompanying qualification examination available at ISE on Web CRD.

¹⁷ The duties of a Financial/Operations Principal include taking appropriate actions to assure that the Member complies with applicable financial and operational requirements under SRO rules and the Exchange Act. The Exchange notes that it is not the Designated Examining Authority for any of its Members, but for consistency with other SRO rules, the Exchange is proposing to include the designation of a Financial/Operations Principal in its Rules.

¹⁸ CBOE Registration Proposal, *supra* note 7.

designated as a Chief Compliance Officer on Schedule A of Form BD for at least two years immediately prior to January 1, 2002, and who has not been subject within the last ten years to any statutory disqualification as defined in Section 3(a)(39) of the Act; a suspension; or the imposition of a \$5,000 or more fine for a violation(s) of any provision of any securities law or regulation, or any agreement with, rule or standard of conduct of any securities governmental agency, securities self-regulatory organization, or as imposed by any such self-regulatory organization in connection with a disciplinary proceeding, shall be required to register in the category of registration appropriate to the function to be performed as prescribed by the Exchange, but shall be exempt from the requirement to pass the heightened qualification examination as prescribed by the Exchange.

In addition, the Exchange is proposing to require registration and successful completion of a heightened qualification examination by at least two individuals that are each an officer, partner or director of each Member.¹⁹ However, the Exchange notes that all individuals who engage in supervisory functions of the Member's securities business shall be required to register and pass the appropriate heightened qualification examination(s) relevant to the particular category of registration. Members that are sole proprietors are exempt from this requirement. In addition, the Exchange may waive the requirement to have two officers, partners and/or directors registered if a Member conclusively demonstrates that only one officer, partner or director should be required to register. For example, a Member could conclusively demonstrate that only one individual is required to register if such Member is owned by one individual (such as a single member limited liability company), such individual acts as the only trader on behalf of the Member, and the Member employs only one other individual who functions only in a clerical capacity. The ability to waive this registration requirement is consistent with similar FINRA rules regarding principal registration.²⁰

ISE is also proposing to allow a Member that conducts proprietary trading only and has 25 or fewer registered persons to have only one officer or partner registered under this

section rather than two. This exception is similar to that of several other exchanges and reflects that such Members do not necessitate the same level of supervisory structure as those Members that have customers or are larger in size. For purposes of this requirement, a Member is be [sic] considered to conduct only proprietary trading if it has the following characteristics: (i) The Member is not required by Section 15(b)(8) of the Exchange Act to become a FINRA member but is a member of another registered securities exchange not registered solely under Section 6(g) of the Exchange Act; (ii) all funds used or proposed to be used by the Member are the Member's own capital, traded through the Member's own accounts; (iii) the Member does not, and will not, have customers; and (iv) all persons registered on behalf of the Member acting or to be acting in the capacity of a trader must be owners of, employees of, or contractors to the Member. The description of what constitutes proprietary trading for purposes of this requirement is appropriate in that it provides additional clarity for associated persons to evaluate whether two individuals are required to register.

Proposed Rule 313 also sets forth the requirements for examinations where there is a lapse in registration. Specifically, an individual associated person shall be required to pass the appropriate qualification examination for the category of registration if the individual associated person's registration has been revoked by the Exchange as a disciplinary sanction or whose most recent registration has been terminated for a period of two or more years.

Additionally, the Exchange proposes to update Rule 604 regarding continuing education requirements so that it is consistent with other SRO rules.²¹ Specifically, the Exchange proposes to add a provision detailing the procedures required for in-house delivery of the regulatory element. The required procedures address responsibly [sic] for the education program, site requirements, technology requirements, supervision requirements, and administration of the program. Members are required to file with their Designated Examining Authority, a letter of attestation signed by a senior officer or partner, attesting to the establishment of the required procedures, and must annually represent that they have continued to maintain all required procedures for the previous year. While the Exchange does not have a floor, for

consistency with other SRO rules, the Exchange also proposes to delete language that excludes those people whose activities are limited solely to the transaction of business on a floor from the definition of "registered person" for purposes of the Rule 604.²²

Finally, this filing proposes to make non-substantive changes to ISE Rule 601 (Registration of Options Principals), Rule 602 (Registration of Representatives) and Rule 603 (Termination of Registered Persons) to define and reference certain terms consistently within these rules and with proposed Rule 313. Specifically, these rules currently contain inconsistent references to the Central Registration Depository, and the registration and termination forms required to be filed under the rules. Additionally, these rules contain reference to the National Association of Securities Dealers or "NASD" which is now known as the Financial Industry Regulatory Authority or "FINRA."

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act,²³ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁴ which requires, among other things, that the Exchange's rules be designed to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. Specifically, the enhanced registration and qualification requirements will provide additional protection to investors and further promote the public interest.

In addition, the Exchange believes that the proposed rule change is consistent with Section 6(c) of the Act,²⁵ in general, and furthers the objectives of Section 6(c)(3)(B) of the Act,²⁶ which provides, among other things, that a national securities exchange may bar a natural person from becoming associated with a member if such natural person does not meet the standards of training, experience and competence as prescribed by the rules of the national securities exchange. The Exchange also believes that the proposed rule change furthers the objectives of Section 6(c)(3)(C) of the Act,²⁷ which provides, among other things, that a national securities exchange may bar any person from

¹⁹ With the exception of its application to sole proprietors, this requirement is consistent with the registration requirement set forth in NASD Rule 1021 addressing registration of two Principals (as defined in NASD Rule 1021).

²⁰ See NASD Rule 1021(e).

²¹ E.g., CBOE Rule 9.3A.

²² See CBOE Registration Proposal, *supra* note 7.

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ 15 U.S.C. 78f(c).

²⁶ 15 U.S.C. 78f(c)(3)(B).

²⁷ 15 U.S.C. 78f(c)(3)(C).

becoming associated with a member if such person does not agree to supply the exchange with such information with respect to its dealings with the member as may be specified by the rules of the exchange and to permit the examination of its books and records to verify the accuracy of any information so supplied.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-ISE-2010-115 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-ISE-2010-115. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-ISE-2010-115 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Florence E. Harmon,
Deputy Secretary.

[FR Doc. 2010-31951 Filed 12-20-10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63552; File No. SR-NYSEAmex-2010-120]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC Establishing Strike Price Intervals of \$1 and Increasing Position and Exercise Limits With Respect to Options on the KBW Bank Index

December 15, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,²

²⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

notice is hereby given that, on December 14, 2010, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Amex Rules 903C and 904C with respect to options on the KBW Bank Index ("BKX" or "Index") to (i) establish strike price intervals of \$1.00 and (ii) increase the position and exercise limits applicable thereto. The text of the proposed rule change is available at the Exchange's principal office, on the Commission's Web site at <http://www.sec.gov>, at the Commission's Public Reference Room, and <http://www.nyse.com>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend NYSE Amex Rules 903C and 904C with respect to options on BKX to (i) establish strike price intervals of \$1.00 and (ii) increase the position and exercise limits applicable thereto. The proposed change would provide investors with greater flexibility with respect to trading options on BKX, which the Exchange intends on listing pursuant to the generic listing standards of Amex Rule 903C, by allowing them to establish positions that are better tailored to meet their investment objectives.

\$1 Strike Price Intervals

The Exchange proposes to list series of BKX at \$1.00 or greater strike price intervals, if the strike price is less than \$200, and to list at least two strike prices above and two strike prices below the current value of the Index at about the time a series is opened for trading on the Exchange.³

As proposed, additional series of BKX could be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when the underlying Index moves substantially from the initial exercise price or prices. To the extent that any additional strike prices are listed by the Exchange, such additional strike prices would be within thirty percent (30%) above or below the closing value of the Index on the prior day. The Exchange could also open additional strike prices that are more than 30% above or below the current Index value provided that demonstrated customer interest exists for such series, as expressed by institutional, corporate, or individual customers or their brokers. Market Makers trading for their own account would not be considered when determining customer interest under this provision. In addition to the initial listed series, the Exchange could list up to sixty (60) additional series per expiration month for each series on BKX. In all cases, however, \$1.00 strike price intervals could be listed on BKX only where the strike price is less than \$200.

As proposed, the Exchange could not list Long-Term Equity Anticipation Securities ("LEAPS") on BKX at intervals less than \$2.50.

The Exchange also proposes an additional delisting policy for BKX, whereby the Exchange would regularly review series that are outside a range of five (5) strikes above and five (5) strikes below the current value of BKX, and would be able to delist series with no open interest in both the put and the call series having a: (a) strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month, and (b) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month.

³ The Exchange notes that similar proposals to list series of BKX at \$1.00 or greater strike price intervals have been previously approved by the Commission. See Securities Exchange Act Release No. 60840 (October 20, 2009), 74 FR 55593 (October 28, 2009) (SR-Phlx-2009-77). See also Securities Exchange Act Release No. 60896 (October 28, 2009), 74 FR 56906 (November 3, 2009) (SR-NYSEArca-2009-98).

The Exchange proposes that, notwithstanding the above delisting policy, customer requests to add strikes and/or maintain strikes in BKX eligible for delisting could be granted.

Accordingly, the Exchange proposes to include these proposed changes as new Commentary .07 to NYSE Amex Rule 903C.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of an expanded number of series as proposed herein.

Position and Exercise Limits

Under NYSE Amex Rule 904C(c), the highest position and exercise limit that a stock index industry group option such as BKX is permitted to have is 31,500 contracts. However, several other options exchanges currently list options on BKX and have expanded their position and exercise limit for options on BKX to 44,000 contracts.⁴ The Exchange believes that it is important for a product like BKX, which is traded on multiple exchanges, to have uniform position and exercise limits in order to eliminate any confusion among investors and other market participants. Accordingly, the Exchange proposes to amend NYSE Amex Rule 904C(c) to similarly increase the position and exercise limits for options on BKX to 44,000 contracts.⁵

The Exchange also proposes a non-substantive change to move the reference to the Pauzé Tombstone Common Stock Index, and the position limit applicable thereto, to a more appropriate location within NYSE Amex Rule 904C(c).

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁷ in particular, in that it is designed to prevent fraudulent and manipulative

⁴ See Securities Exchange Act Release No. 49312 (February 24, 2004), 69 FR 9672 (March 1, 2004) (SR-Phlx-2004-13). See also Securities Exchange Act Release No. 55932 (June 20, 2007), 72 FR 35288 (June 27, 2007) (SR-NYSEArca-2007-54).

⁵ The Exchange notes that, as provided under NYSE Amex Rule 905C(ii), the amount of stock index industry group options contracts that can be exercised pursuant to NYSE Amex Rule 905C is the same number of contracts established pursuant to NYSE Amex Rule 904C as the position limit for such options, and thus does not require that the text of NYSE Amex Rule 905C be amended to effect the change proposed herein.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the changes proposed herein would provide investors with greater flexibility to establish positions that are better tailored to meet their investment objectives while also eliminating potential confusion by aligning the Exchange's position and exercise limits with that of other options exchanges.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments to the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(6) thereunder.⁹

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that has been approved by the Commission.¹⁰ Therefore, the

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁰ See *supra* notes 3 and 4.

Commission designates the proposal operative upon filing.¹¹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAmex-2010-120 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAmex-2010-120. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAmex-2010-120 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010-31949 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63546; File No. SR-CBOE-2010-106]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Proposed Rule Change, as Modified by Amendment No. 1, To Amend Margin Requirements for Credit Options

December 15, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 1, 2010, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II, below, which Items have been substantially prepared by the Exchange. On December 14, 2010, the Exchange filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend Rule 12.3(l), *Margin Requirements*, to make CBOE's margin requirements for Credit Options consistent with Financial Industry Regulatory Authority ("FINRA") Rule 4240, *Margin Requirements for Credit Default Swaps*. CBOE's Credit Options

(i.e., Credit Default Options and Credit Default Basket Options) are analogous to credit default swaps.⁴ The text of the rule proposal is available on the Exchange's Web site (<http://www.cboe.org/legal>), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

This filing proposes to amend Rule 12.3(l), *Margin Requirements*, to make CBOE's margin requirements for Credit Options consistent with FINRA Rule 4240, *Margin Requirements for Credit Default Swaps*. CBOE's Credit Options consist of two variations—Credit Default Options and Credit Default Basket Options. Credit Default Options and Credit Default Basket Options are also referred to as "Credit Event Binary Options." Effectively, both contracts operate in the same manner as credit default swap contracts.

Amendment No. 1 replaces the original filing in its entirety. The purpose of Amendment No. 1 is to restate the original proposal on a pilot basis.

As with a credit default swap contract, the buyer of a Credit Option contract is buying protection from the seller of the Credit Option. This protection is in the form of a monetary payment from the Credit Option seller to the Credit Option buyer in the event that the issuer of debt securities, or Reference Entity, specified as underlying the Credit Option contract has a Credit Event (e.g., declares bankruptcy), consequently defaulting on the payment of principal and interest on its debt securities. When a Credit Option buyer and seller initially open

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 to SR-CBOE-2010-106 replaced and superseded the original rule filing in its entirety.

⁴ CBOE's Credit Default Options and Credit Default Basket Options are also referred to as Credit Event Binary Options.

¹¹ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

their positions via a transaction consummated on the Exchange, the Credit Option buyer's account is charged (debited) for the cost of the protection. The Credit Option seller's account is credited. For the protection, there is only a one-time debit and credit to the buyer and seller, respectively. If, prior to expiration of the Credit Option, a Credit Event occurs (e.g., bankruptcy is declared), the Credit Option contract is settled with a credit to the Credit Option buyer's account for a predetermined payout amount (e.g., \$1,000), based on the Exchange's contract specifications. The Credit Option seller's account is debited (charged) for the payout amount.

Credit Default Options have a single Reference Entity. Credit Default Basket Options have multiple Reference Entities. If a Credit Default Basket Option is specified as having a single payout, settlement is triggered when any one of the component Reference Entities has a Credit Event (e.g., declares bankruptcy) and thereafter the option ceases to exist. The payout is the settlement amount attached to that one Reference Entity. If a Credit Default Basket Option is specified as having multiple payouts, a settlement is triggered when any one of the component Reference Entities has a Credit Event (e.g., declares bankruptcy), but the option continues to exist until its expiration. Therefore, additional settlements would be triggered if, and as, any Credit Events occur in respect of the remaining Reference Entity components. The payout is the settlement amount attached to each particular Reference Entity.

The current Exchange margin requirements for Credit Options were established before FINRA implemented margin requirements for credit default swaps (FINRA Rule 4240). In order to be consistent with FINRA margin requirements and establish a level playing field for similar instruments, CBOE's proposed amendments adopt the FINRA requirements to a large extent. For Credit Default Options, which overlie a single Reference Entity, CBOE proposes to adopt FINRA's margin percentage table for credit default swaps. With respect to Credit Default Basket Options, CBOE is adopting the margin percentage table that FINRA requires for CDX indices because, like an index, a Credit Default Basket Option involves multiple component Reference Entities. CBOE proposes to revise the FINRA column headings to fit Credit Options. FINRA Rule 4240 requires the percentage to be applied to the notional amount of a credit default swap. CBOE's proposed

rules would require that the percentage be applied to the settlement value of a Credit Option to arrive at a margin requirement because the settlement value of a Credit Option is analogous to the notional amount of a credit default swap. CBOE's proposed rules incorporate all other relevant aspects of FINRA 4240, such as risk monitoring procedures and guidelines, and concentration charge (net capital) requirements.

It should be noted that CBOE's proposed rules would require no margin in the case of a spread (i.e., long and short Credit Options with the same underlying Reference Entity or Entities.) This differs from FINRA Rule 4240, which requires margin of 50% of the margin required on the long or short (credit default swap), whichever is greater. CBOE is proposing no margin because the long and short are required to have the same underlying Reference Entity. Moreover, Credit Options are standardized and are settled through The Options Clearing Corp.

CBOE's proposed rules would also require no margin on a short Credit Default Option that is offset with a short position in a debt security issued by the Reference Entity underlying the option. This language differs from the debt security offset allowed under FINRA Rule 4240. However, applicable margin must still be collected on the short position in a debt security as prescribed pursuant to applicable margin rules. Rule 4240 requires no margin for a long credit default swap contract that is paired with a long position in the underlying debt security. However, this type of offset does not appear to be workable in respect of a Credit Default Option.

The proposal will become effective on a pilot basis to run a parallel track with FINRA Rule 4240 that operates on an interim pilot basis which is currently scheduled to expire on July 16, 2011.⁵ If the Exchange were to propose an extension of the Credit Option Margin Pilot Program or should the Exchange propose to make the Pilot Program permanent, then the Exchange would submit a filing proposing such amendments to the Pilot Program.

2. Statutory Basis

The Exchange believes this rule proposal is consistent with the Act and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the

requirements of Section 6(b) of the Act.⁶ Specifically, the Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) Act⁷ requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest, and because it enhances fair competition among exchange markets.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) By order approve or disapprove such proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2010-106 on the subject line.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁵ See Securities Exchange Act Release No. 63391 (November 30, 2010), 75 FR 75718 (December 6, 2010) (notice of filing for immediate effectiveness extending FINRA Rule 4240 margin interim pilot program to July 16, 2011).

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2010–106. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions.

You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–106 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon,
Deputy Secretary.

[FR Doc. 2010–31932 Filed 12–20–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63538; File No. SR–NYSE–2010–75]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 123C To Clarify That Exchange Systems Enforce Rule 123C With Respect to Market At-The-Close and Limit At-The-Close Order Entry After 3:45 p.m.

December 14, 2010.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”) and Rule 19b–4 thereunder,² notice is hereby given that on December 6, 2010, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 123C to clarify that Exchange systems enforce Rule 123C with respect to Market At-The-Close (“MOC”) and Limit At-The-Close (“LOC”) order entry after 3:45 p.m. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend Rule 123C to clarify that Exchange systems enforce Rule 123C with respect to MOC³ and LOC⁴ order entry after 3:45 p.m.

Rule 123C governs certain closing procedures on the Exchange, including MOC, LOC and CO order entry, cancellation of such orders and the calculation and publication of imbalances. In particular, Rule 123C(2)(b) currently provides that MOC/LOC interest may be entered after 3:45 p.m. only to offset a Mandatory MOC/LOC Imbalance Publication. The rule therefore suggests that members or member organizations entering MOC or LOC orders are actively responsible for compliance therewith (*e.g.*, “orders may be entered”). However, Exchange systems enforce compliance with this rule pursuant to system functionality that allows only the entry of offsetting MOC/LOC interest after 3:45 p.m. and blocks the entry of all MOC/LOC orders that would join the same side of a published MOC/LOC imbalance and the entry of MOC/LOC orders after 3:45 p.m. for securities for which there has not been a Mandatory MOC/LOC Imbalance Publication.⁵ Exchange systems also enforce compliance with this rule pursuant to system functionality that allows or blocks, depending upon the circumstances, MOC/LOC order entry in the event of a Trading Halt.

The Exchange proposes to amend Rule 123C(2) and (3) generally to clarify that Exchange systems enforce compliance with the rules, and therefore clarify that members and member organizations are not responsible for ensuring compliance with this aspect of the rule.

The Exchange proposes additional clean-up amendments to Rule 123C. Specifically, the Exchange proposes to delete certain text in Rule

³ A MOC order is a market order in a security that, by its terms, is to be executed in its entirety at the closing price. If not executed due to tick restrictions or a trading halt, the order will be cancelled. *See* Rule 13 (Definitions of Orders).

⁴ A LOC order is a limit order in a security that is entered for execution at the closing price of the security on the Exchange provided that the closing price is at or within the specified limit. If not executed due to a trading halt or because, by its terms it is not marketable at the closing price, the order will be cancelled. *See* Rule 13 (Definitions of Orders).

⁵ *See* Information Memos 09–12 and 10–11, respectively.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

⁸ 17 CFR 200.30–3(a)(12).

123C(2)(b)(ii)⁶ and 123C(2)(c)(iii)⁷ pertaining to a “no imbalance” notification after dissemination of an Informational Imbalance as well as the text of current Rule 123C(2)(b)(iii), because these provisions are no longer necessary due to the system-enforced compliance with MOC/LOC order entry. In addition, the Exchange proposes to amend Rule 123C(3)(c) to clarify that Exchange systems will reject cancellations of MOC, LOC and CO orders after 3:58 p.m. and to add a reference to Rule 123C(9), which pertains to alternative procedures in the case of extreme order imbalances at the close.

Because the Exchange previously disclosed this system functionality to member organizations, the Exchange believes that this rule proposal would not require technical programming and/or modification by members or member organizations.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the changes proposed herein would reflect that Exchange systems enforce compliance with Rule 123C(2) and (3) and therefore clarify that Exchange members and member organizations are not responsible for ensuring such compliance.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

⁶ See e-mail from Clare F. Saperstein, Vice President, Regulatory Policy and Management, NYSE Regulation, Inc., to Nathan Saunders, Special Counsel, Division of Trading and Markets, Commission, dated December 10, 2010 (amending the proposed rule change by replacing the reference to “Rule 123C(2) and (3)” with “Rule 123C(2)(b)(ii) and 123C(2)(c)(iii)”).

⁷ See *id.*

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change will take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(i) of the Act¹⁰ and Rule 19b-4(f)(1) thereunder,¹¹ because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. Specifically, the change proposed herein would reflect that Exchange systems enforce compliance with Rule 123C(2) and (3) and therefore clarify that Exchange members and member organizations are not responsible for ensuring such compliance.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2010-75 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2010-75. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2010-75 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010-31928 Filed 12-20-10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63536; File No. SR-NASDAQ-2010-163]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Collection of Exchange Fees

December 14, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4² thereunder, notice is hereby given that, on December 8, 2010, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(i).

¹¹ 17 CFR 240.19b-4(f)(1).

have been prepared by the NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASDAQ Stock Market LLC proposes to create a new Rule 7007 titled "Collection of Exchange Fees and Other Claims—NASDAQ Options Market" to require members to provide a clearing account number at the National Securities Clearing Corporation ("NSCC") for purposes of permitting the Exchange to debit any undisputed or final fees, fines, charges and/or other monetary sanctions or monies due and owing to the Exchange.

The text of the proposed rule change is available on the Exchange's Web site at <http://www.nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to create an efficient method of collecting undisputed or final fees, fines, charges and/or other monetary sanctions or monies due and owing to the Exchange from NASDAQ Options Market ("NOM") members.³ This proposal would provide a cost savings to the Exchange by alleviating administrative processes related to the collection of monies owed to the Exchange. Collection matters divert staff resources away from the Exchange's regulatory and business purposes. In addition, the debiting process would

prevent member accounts from becoming overdue.

Currently, the Exchange issues monthly invoices to NOM members, which invoices are paid by NOM members directly to the Exchange's accounting department. The Exchange proposes to require NOM members and applicants to provide a clearing account number for an account at NSCC in order to permit the Exchange to debit any undisputed or final fees, fines, charges and/or monetary sanctions or other monies due and owing to the Exchange or other charges related to Rule 1002(c)(2).⁴

The Exchange would continue to send a monthly invoice⁵ to each NOM member on approximately the 4th–6th business day of the following month. The Exchange would also send a file to NSCC each month on approximately the 23rd of the following month to initiate the debit of the appropriate amount stated on the member's invoice for the prior month. Because the members would receive an invoice well before any monies are debited (normally within two weeks), the members would have adequate time to contact the staff with any questions concerning their invoice.

If a NOM member disagrees with the invoice, the Exchange would not commence the debit until the dispute is resolved. Specifically, if a member disputes an invoice, the Exchange will not include the disputed amount in the debit if the member has disputed the amount in writing to the Exchange's designated staff by the 15th of the month, or the following business day if the 15th is not a business day, and the amount in dispute is at least \$10,000 or greater.

Once NSCC receives the file from the Exchange, NSCC would proceed to debit the amounts indicated from the clearing members' account. In the instance where the member clears through an Exchange clearing member, the estimated transactions fees owed to the Exchange are typically debited by the clearing member on a daily basis in order to ensure adequate funds have

been escrowed. The Exchange would debit any monies owed including undisputed or final fees,⁶ fines, charges and/or monetary sanctions or monies due and owed to the Exchange.⁷ The Exchange believes that the debit process would eliminate the risk of unpaid invoices because of the large amounts of capital held at NSCC by members.

The Exchange is also proposing to amend Exchange Rules 1002, Qualifications of Nasdaq Members and Associated Persons, and Exchange Rule 8320, Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay, to reference new Exchange Rule 7007.

The Exchange would provide NOM members with a thirty (30) day period, upon publication of this rule change, to provide the Membership Department with an NSCC number.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁸ in general, and furthers the objectives of Section 6(b)(5) of the Act⁹ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by providing its NOM members with an efficient process to pay undisputed or final fees, fines, charges and/or monetary sanctions or monies due and owing to the Exchange. The Exchange believes that this process of debiting NSCC accounts would ease the NOM member's administrative burden in paying monthly invoices, avoid overdue balances and provide same day collection from all NOM members, who owe monies to the Exchange, which results in equitable treatment.

⁶ See applicable Exchange fees at Rule 7050 and Rule 7053.

⁷ This includes, among other things, fines which result from: violations of the Minor Rule Plan pursuant to Chapter X, Section 7 and monetary sanctions pursuant to Rule 8310, 8320 or 8330. With respect to disciplinary sanctions, the Exchange would not debit any monies until such action is final. The Exchange would not consider an action final until all appeal periods have run and/or all appeal timeframes are exhausted. With respect to non-disciplinary actions, the Exchange would similarly not take action to debit a member account until all appeal periods have run and/or all appeal timeframes are exhausted. Any uncontested disciplinary or non-disciplinary actions will be debited, and the amount due will appear on the members invoice prior to the actual NSCC debit.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

³ The Exchange will not debit accounts for fees that are unusually large or for special circumstances, unless such debiting is requested by the member.

⁴ Exchange Rule 1002(c)(1) titled Payment of Fees, Dues, Assessments, and Other Charges by Members and Associated Persons, states that fees, dues, assessments, and other charges shall be called and payable by members and associated persons as determined by Nasdaq from time to time.

⁵ The monthly invoice will indicate that the amount on the invoice will be debited from the designated NSCC account. Each month, the Exchange will send a file to the member's clearing firm which will indicate the amounts to be debited from each member. If a member is "self-clearing," no such file would be sent as the member would receive the invoice, as noted above, which would indicate the amount to be debited.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act¹⁰ and Rule 19b-4(f)(6)¹¹ thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2010-163 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2010-163. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission,¹² all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2010-163 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010-31925 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63544; File No. SR-C2-2010-011]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the C2 Fees Schedule

December 14, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 8, 2010, C2 Options Exchange, Incorporated (the "Exchange" or "C2") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

C2 proposes to amend its Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/legal>), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

C2 proposes to amend its Fee Schedule to clarify that the transaction fees in the Fee Schedule also apply to equity options listed on C2 that are not in the options penny pilot. The current transaction fee section of the C2 Fee

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NASDAQ has satisfied this requirement.

¹² The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov>.

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Schedule references that the transaction fees apply to “all multiply-listed, penny pilot equity and ETF options classes”. The rule change will eliminate the “penny pilot” reference.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,³ in general, and furthers the objectives of Section 6(b)(4)⁴ of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among C2 Trading Permit Holders and other persons using Exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A)(ii)⁵ of the Act and subparagraph (f)(2) of Rule 19b-4⁶ thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-C2-2010-011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-C2-2010-011. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of C2. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-C2-2010-011 and should be submitted on or before January 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Florence E. Harmon,
Deputy Secretary.

[FR Doc. 2010-31930 Filed 12-20-10; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

Supatcha Resources Inc.; Order of Suspension of Trading

December 17, 2010.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Supatcha Resources Inc. (“Supatcha”) because of questions regarding the accuracy of assertions by Supatcha in public statements to investors concerning, among other things: (1) A geological report on certain mining prospects in Ukraine; and (2) a tender offer for Supatcha's outstanding shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading of the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, December 17, 2010 through 11:59 p.m. EST, on December 31, 2010.

By the Commission.

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2010-32096 Filed 12-17-10; 4:15 pm]

BILLING CODE 8011-01-P

DEPARTMENT OF STATE

[Public Notice: 6826]

Meeting of Advisory Committee on International Communications and Information Policy

The Department of State's Advisory Committee on International Communications and Information Policy (ACICIP) will hold a public meeting on January 13, 2011 from 9 a.m. to 12 p.m. in the Loy Henderson Auditorium of the Harry S. Truman Building of the U.S. Department of State. The Truman Building is located at 2201 C Street, NW., Washington, DC 20520.

The committee provides a formal channel for regular consultation and coordination on major economic, social and legal issues and problems in international communications and information policy, especially as these issues and problems involve users of information and communications services, providers of such services, technology research and development, foreign industrial and regulatory policy,

³ 15 U.S.C. 78f(b).

⁴ 15 U.S.C. 78f(b)(4).

⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

⁶ 17 CFR 240.19b-4(f)(2).

⁷ 17 CFR 200.30-3(a)(12).

the activities of international organizations with regard to communications and information, and developing country issues.

The meeting will be led by ACICIP Chair Mr. Thomas Wheeler of Core Capital Partners and Ambassador Philip L. Verveer, U.S. Coordinator for International Communications and Information Policy. The meeting's agenda will include discussions pertaining to various upcoming international telecommunications meetings and conferences, as well as bilateral and multilateral meetings that have taken place recently. In addition, the Committee will discuss key issues of importance to U.S. communications policy interests including privacy, cyber-security, cyber-crime, and recent events efforts focused on the information and communications technology (ICT) aspects of private sector international disaster response.

Members of the public may submit suggestions and comments to the ACICIP. Submissions regarding an event, consultation, meeting, etc. listed in the agenda above should be received by the ACICIP Executive Secretary (contact information below) at least ten working days prior to the date of that listed event. All comments must be submitted in written form and should not exceed one page for each country (for comments on consultations) or for each subject area (for other comments). Resource limitations preclude acknowledging or replying to submissions.

While the meeting is open to the public, admittance to the Department of State building is only by means of a pre-clearance. For placement on the pre-clearance list, please submit the following information no later than 5 p.m. on Monday, January 10, 2011. (*Please note* that this information is not retained by the ACICIP Executive Secretary and must therefore be re-submitted for each ACICIP meeting):

- I. State That You Are Requesting Pre-Clearance to a Meeting
- II. Provide the Following Information
 1. Name of meeting and its date and time
 2. Visitor's full name
 3. Date of birth
 4. Citizenship
 5. Acceptable forms of identification for entry into the U.S. Department of State include:
 - U.S. driver's license with photo
 - Passport
 - U.S. government agency ID
 8. ID number on the form of ID that the visitor will show upon entry
 9. Whether the visitor has a need for

reasonable accommodation. Such requests received after January 3rd might not be possible to fulfill.

Send the above information to Joseph Burton by fax (202) 647-7407 or e-mail BurtonKJ@state.gov.

All visitors for this meeting must use the 23rd Street entrance. The valid ID bearing the number provided with your pre-clearance request will be required for admittance. Non-U.S. government attendees must be escorted by Department of State personnel at all times when in the building.

Personal data is requested pursuant to Public Law 99-399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107-56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS-D) database. *Please see* the Privacy Impact Assessment for VACS-D at <http://www.state.gov/documents/organization/100305.pdf> for additional information.

For further information, please contact Joseph Burton, Executive Secretary of the Committee, at (202) 647-5231 or BurtonKJ@state.gov.

General information about ACICIP and the mission of International Communications and Information Policy is available at: <http://www.state.gov/e/eeb/adcom/c667.htm>

Dated: December 14, 2010.

Joseph Burton,

ACICIP Executive Secretary, Department of State.

[FR Doc. 2010-31996 Filed 12-20-10; 8:45 am]

BILLING CODE 4710-07-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE-2010-59]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary

is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before January 10, 2011.

ADDRESSES: You may send comments identified by Docket Number FAA-2010-1226 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590.

- *Fax:* Fax comments to the Docket Management Facility at 202-493-2251.

- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78).

Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time or to the Docket Management Facility in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: David Staples (202) 267-4058, Keira Jones (202) 267-4025, or Tyneka Thomas (202) 267-7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 16, 2010.

Pamela Hamilton-Powell,
Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2010–1226.

Petitioner: Skywarrior, Inc.

Section of 14 CFR Affected: 14 CFR 141.5(e), 141.27(b), 141.45, 141.55(c)(1), and 141.81.

Description of Relief Sought:

Skywarrior, Inc. is requesting relief from the requirement concerning renewal of the school's provisional pilot school certificate and ratings. Additionally, the petitioner requests relief from the ground training facilities requirements given the school's use of online training material, as well as the ground training instructor requirement given the use of non-FAA certificated or part 141 school supervised military instructors. The petitioner also requests relief from the requirement to graduate at least 10 different people from the school's approved training course in order to maintain a part 141 pilot school certificate and associated ratings.

[FR Doc. 2010–31958 Filed 12–20–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–60]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before January 10, 2011.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–1245 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.

- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Keira Jones (202) 267–4025, Tyneka Thomas (202) 267–7626 or David Staples (202) 267–4058, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 15, 2010.

Dennis Pratte,

Acting Director, Office of Rulemaking.

Petition For Exemption

Docket No.: FAA–2010–1245.

Petitioner: Gulfstream Aerospace Corporation.

Section of 14 CFR Affected: 14 CFR 61.75(d)(2) and 61.117.

Description of Relief Sought: Relief is sought to allow Gulfstream to allow foreign-licensed pilots under the employ of the European Aviation Safety Agency (EASA) to obtain private pilot certificates with instrument rating privileges, without having to be administered the appropriate knowledge test. In addition, it would allow pilots

to be compensated, either directly or indirectly by their respective agencies for their participation, carrying persons or property.

[FR Doc. 2010–31966 Filed 12–20–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Statute of Limitations on Claims; Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans), pursuant to 23 U.S.C. 327.

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final within the meaning of 23 U.S.C. 139(l)(1). The actions relate to a proposed highway project, the State Route 2 Freeway Terminus Improvement project from approximately 0.5 miles south of Braden Street (PM 13.5) to the Interstate 5(I–5)/SR–2 interchange (PM 15.2) in the County of Los Angeles, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 20, 2011. If the Federal law that authorizes judicial review of a claim provides a time period of less than 180 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Jinous Saleh, Branch Chief, Division of Environmental Planning, Caltrans District 7, 100 S Main St, MS 16A, Los Angeles, CA 90012, (213) 897–0683, jinous.saleh@dot.ca.gov.

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the Federal Highway Administration (FHWA) assigned, and the California Department of Transportation (Caltrans) assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Modification of the southern

terminus of State Route 2 (SR-2) from approximately 0.5 miles south of Branden St. (PM 13.5) to the Interstate 5(I-5)/SR-2 interchange (PM 15.2) in the city and county of Los Angeles. The purposes of the project are to better manage traffic flow and enhance vehicular and pedestrian mobility and safety in the vicinity of the SR-2 terminus. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) approved on October 14, 2010 and in other documents in the FHWA project records. The EA, FONSI and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans EA and FONSI can be viewed and downloaded from the project Web site at <http://www.dot.ca.gov/dist07/resources/envdocs>.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. National Environmental Policy Act (NEPA) [42 U.S.C. 4321-4351]; Federal-Aid Highway Act [23 U.S.C. 109]
2. Clean Air Act [42 U.S.C. 7401-7671(q)]
3. Migratory Bird Treaty Act [16 U.S.C. 703-712]
4. Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(aa)-11]
5. Civil Rights Act of 1964 [42 U.S.C. 2000(d)-2000(d)(1)]
6. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [42 USC 9601-9675]; Superfund Amendments and Reauthorization Act of 1986 (SARA).
7. Executive Orders: E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations; E.O. 11593 Protection and Enhancement of Cultural Resources; E.O. 13112 Invasive Species.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1)

Issued on: December 14, 2010.

Maiser Khaled,

Acting Director, State Programs, Federal Highway Administration, Sacramento, California.

[FR Doc. 2010-31903 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-RY-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Waiver of Compliance

In accordance with part 211 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) has received a request for a waiver of compliance from certain requirements of its safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

Hoosier Valley Railroad Museum, Inc.

[Waiver Petition Docket Number FRA-2010-0161]

The Hoosier Valley Railroad Museum, Inc. (HVRM) of North Judson, Indiana, has petitioned for a permanent waiver of compliance for five cabooses from the requirements of the Railroad Safety Glazing Standards, title 49 CFR part 223, which require certified glazing in all windows. The subject cabooses do not meet the glazing requirements as per 49 CFR 223.13. The reporting marks on these cabooses, with built-years in parentheses, are as follows: B&LE 1989 (1956), EL C345 (1953), NKP 471 (1962), GTW 75072 (1948) and EJ&E 184 (1970). HVRM states that they are a 501(c)(3) non-profit organization with the mission to preserve railroad history in northwest Indiana. The subject cabooses are used in tourist, historic and/or excursion operations for the purpose of historic demonstration, photography and film production.

The subject cabooses are only operated at limited track speed over the Chesapeake & Indiana Railroad (CKIN) over tracks owned by the Town of North Judson, Indiana, and are operated under yard limits subject to the authority of CKIN. HVRM states that the installed glass is in good condition, operations are in a benign environment, and the expense of retrofitting the subject cabooses with FRA certified glazing will impose a high financial burden.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number FRA-2010-0161) and may be submitted by any of the following methods:

- **Web site:** <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- **Fax:** 202-493-2251.
- **Mail:** Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12-140, Washington, DC 20590.
- **Hand Delivery:** 1200 New Jersey Avenue, SE., Room W12-140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Communications received within 45 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.-5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at <http://www.regulations.gov>.

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Page 19477) or at <http://www.dot.gov/privacy.html>.

Issued in Washington, DC, on December 15, 2010.

Robert C. Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2010-31937 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-06-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2010–0171; Notice 1]

Nissan North America, Inc., Receipt of Petition for Decision of Inconsequential Noncompliance

Nissan North America, Inc. (Nissan)¹ has determined that certain model year 2008 through 2010 Nissan Titan trucks do not fully comply with the requirements of paragraph S19.2.2(b) of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection*. Nissan has filed an appropriate report pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*, dated August 18, 2010.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Nissan has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Nissan's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Nissan estimates that approximately 102,254 model year 2008 through 2010 Nissan Titan trucks that were manufactured from April 10, 2007, through August 6, 2010, are affected.

Paragraph S19.2.2 of FMVSS No. 208 requires in pertinent part:

S19.2.2 The vehicle shall be equipped with at least one telltale which emits light whenever the passenger air bag system is deactivated and does not emit light whenever the passenger air bag system is activated, except that the telltale(s) need not illuminate when the passenger seat is unoccupied. Each telltale: * * *

(b) Shall have the identifying words "PASSENGER AIR BAG OFF" or "PASS AIR BAG OFF" on the telltale or within 25 mm (1.0 in) of the telltale; and * * *

Nissan states that the noncompliance is that the label identifying the amber air bag status telltale lamp for the front outboard passenger seating position is identified with the words "PASSENGER AIR BAG" instead of "PASSENGER AIR BAG OFF."

Nissan believes the noncompliance is inconsequential to motor vehicle safety for the following reasons:

1. The passenger air bag system on the subject vehicles operates as designed and automatically deactivates the passenger air bag when it is appropriate in accordance with the requirements in S19.2 of FMVSS No. 208. That is, the system requires no input from the operator to perform its intended function. Further, the front passenger airbag status telltale operates correctly and illuminates when the passenger air bag is deactivated as required by the standard.

2. The meaning of the air bag status telltale alone (without the identifying words) is unequivocal to the vehicle occupants. The telltale remains off when the passenger air bag is in the normal mode. When the passenger air bag is deactivated, the telltale is illuminated, showing an icon representing an air bag with an X drawn over it. This clearly represents a deactivated air bag. Nissan notes that in certain other markets, the telltale alone is deemed sufficient with no identifying words required next to the telltale. The identifying words "passenger side air bag" (without the word "OFF") do not confuse the otherwise clear and readily apparent meaning of the telltale.

3. Information provided in several locations in the vehicle owner's manual further reduces any possibility of operator confusion. If the meaning of telltale is unclear, the operator can refer to multiple explanations in the owner's manual.

4. Telltale Function is also described in Quick Reference Guide.

5. There have been no customer complaints, injuries, or accidents related to the word "OFF" missing from the label. Nissan has searched its databases and has found no cases of misunderstanding the telltale.

6. Nissan conducted an informal survey at Nissan's National Headquarters Building in Franklin, Tennessee. The building houses mostly business personnel (sales marketing, finance) and not design engineers that would have special understanding of the air bag systems. As employees were approaching the building to begin their workday, they were asked to participate in a survey regarding the Titan and that the survey would take about 30 seconds of their time. The participants represented a good cross-section of the general population by age, gender and race. The subject Titan pickup truck was equipped with the required yellow passenger side air bag status telltale that contained the "no air bag" symbol, but did not display the word "OFF". The passenger air bag telltale was illuminated. Survey participants were asked to describe the meaning of the

telltale. Sixty people participated in the survey. Of the sixty people, 58 responded correctly that the telltale indicated the passenger side airbag was in suppressed mode. The survey shows that people understand the meaning of the passenger air bag telltale even with the word "OFF" missing. We note also that adding the word "OFF" did not help the two respondents to understand the meaning of the telltale. They would have needed to consult the Owner's Manual. Nissan acknowledges that this was an ad hoc survey that may not meet rigid statistical standards, nevertheless, we believe it is predictive of the results that would be obtained from a larger, controlled survey.

7. A decision to grant this petition would be consistent with arguably similar prior requests related to labeling issues. For example, NHTSA has previously granted petitions related to certain tire and tire placard labeling errors.

Nissan also states that it has taken steps to correct the non-compliance in future production.

Supported by the above stated reasons, Nissan believes that the described FMVSS No. 208 noncompliance is inconsequential to motor vehicle safety, and that its petition, to exempt it from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. By mail addressed to: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. By hand delivery to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open

¹ Nissan North America, Inc., is a state of Tennessee corporation that manufactures and imports motor vehicles and motor vehicle equipment.

on weekdays from 10 am to 5 pm except Federal Holidays.

c. Electronically: by logging onto the Federal Docket Management System (FDMS) Web site at <http://www.regulations.gov/>. Follow the online instructions for submitting comments. Comments may also be faxed to 1-202-493-2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to <http://www.regulations.gov/>, including any personal information provided.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at <http://www.regulations.gov/> by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000 (65 FR 19477-78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: January 20, 2011.

Authority: (49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8)

Issued on: December 15, 2010.

Claude H. Harris,

Acting Associate Administrator for Enforcement.

[FR Doc. 2010-32013 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2010-0166; Notice 1]

Panda Power LLC, Receipt of Petition for Decision of Inconsequential Noncompliance

Panda Power LLC (Panda Power),¹ has determined that High Intensity Discharge (HID) lighting kits² that it imported and sold during 2007, 2008 and 2009 failed to meet the requirements of paragraph S7.7 of Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment*. Panda Power has filed an appropriate report pursuant to 49 CFR Part 573, *Defect and Noncompliance Responsibility and Reports*, dated February 10, 2010.

Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Panda Power has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Panda Power's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Panda Power estimates that approximately 1,851 headlamp kits that it sold during 2007, 2008 and 2009 are affected. All of the affected kits were manufactured by Guangzhou Kingwoodcar Company, LTD, Guangzhou City, China.

Paragraph S7.7 of FMVSS No. 108 requires:

S7.7 Replaceable light sources. Each replaceable light source shall be designed to conform to the dimensions and electrical specifications furnished with respect to it pursuant to part 564 of this chapter, and shall conform to the following requirements:

(a) If other than an HB Type, the light source shall be marked with the bulb marking designation specified for it in compliance with Appendix A or Appendix B of part 564 of this chapter. The base of each HB Type shall be marked with its HB Type designation. Each replaceable light source shall also be marked with the symbol DOT

¹ Panda Power, LLC (Panda Power) is organized under the laws of the State of Arizona and is the importer of the subject nonconforming replacement equipment. Panda Power sold the nonconforming replacement equipment while doing business under the name Mobile HID.

² Panda Power's high-intensity lighting (HID kits each contained 2 lamps, 2 lamp ballasts and a wiring harness with relay and fuse).

and with a name or trademark in accordance with paragraph S7.2.

(b) The measurement of maximum power and luminous flux that is submitted in compliance with Appendix A or Appendix B of part 564 of this chapter shall be made in accordance with this paragraph. The filament or discharge arc shall be seasoned before measurement of either. Measurement shall be made with the direct current test voltage regulated within one quarter of one percent. The test voltage shall be 12.8v. The measurement of luminous flux shall be in accordance with the Illuminating Engineering Society of North America, LM-45, IES Approved Method for Electrical and Photometric Measurements of General Service Incandescent Filament Lamps (April 1980); shall be made with the black cap installed on Type HB1, Type HB2, Type HB4, and Type HB5, and on any other replaceable light source so designed; and shall be made with the electrical conductor and light source base shrouded with an opaque white cover, except for the portion normally located within the interior of the lamp housing. The measurement of luminous flux for the Types HB3 and HB4 shall be made with the base covered with a white cover as shown in the drawings for Types HB3 and HB4 filed in Docket No. NHTSA 98-3397. (The white cover is used to eliminate the likelihood of incorrect lumen measurement that will occur should the reflectance of the light source base and electrical connector be low).

(c) The capsule, lead wires and/or terminals, and seal on each Type HB1, Type HB3, Type HB4, and Type HB5 light source, and on any other replaceable light source which uses a seal, shall be installed in a pressure chamber as shown in Figure 25 so as to provide an airtight seal. The diameter of the aperture in Figure 25 on a replaceable light source (other than an HB Type) shall be that dimension furnished for such light source in compliance with Appendix A or Appendix B of part 564 of this chapter. An airtight seal exists when no air bubbles appear on the low pressure (connector) side after the light source has been immersed in water for one minute while inserted in a cylindrical aperture specified for the light source, and subjected to an air pressure of 70kPa (10 P.S.I.G.) on the glass capsule side.

(d) The measurement of maximum power and luminous flux that is submitted in compliance with section VII of Appendix A of part 564 of this chapter, or section IV of Appendix B of part 564 of this chapter, shall be made with the direct current test voltage regulated within one quarter of one percent. The test voltage shall be 12.8v. The measurement of luminous flux shall be in accordance with the Illuminating Engineering Society of North America, LM 45; IES Approved Method for Electrical and Photometric Measurements of General Service Incandescent Filament Lamps (April 1980). The filament of a replaceable light source shall be seasoned before such measurement. The white covers are used to eliminate the likelihood of incorrect lumens measurement that will occur should the reflectance of the light source base and electrical connector be low.

(1) For a light source with a resistive element type filament, seasoning of the light

source shall be made in accordance with section 2.9 of SAE Standard J1383 APR85 Performance Requirements for Motor Vehicle Headlamps. The measurement of luminous flux shall be made with the black cap installed on Type HB1, Type HB2, Type HB4, and Type HB5 light sources, and on any other replaceable light source so designed, and shall be made with the electrical conductor and light source base shrouded with an opaque white colored cover, except for the portion normally located within the interior of the lamp housing. The measurement of luminous flux for Type HB3 and Type HB4 shall be made with the base covered with the white cover shown in the drawings for Types HB3 and HB4 filed in Docket No. NHTSA 98-3397.

(2) For a light source using excited gas mixtures as a filament or discharge arc, seasoning of the light source system, including any ballast required for its operation, shall be made in accordance with section 4.0 of SAE Recommended Practice J2009 FEB93 Discharge Forward Lighting Systems. With the test voltage applied to the ballast input terminals, the measurement of luminous flux shall be made with the black cap installed, if so designed, and shall be made with an opaque white colored cover, except for the portion normally located within the interior of the lamp housing.

(e) If a ballast is required for operation, each ballast shall bear the following permanent markings:

(1) Name or logo of ballast manufacturer;

(2) Ballast part number or unique identification;

(3) Part number or other unique identification of the light source for which the ballast is designed;

(4) Rated laboratory life of the light source/ballast combination, if the information for the light source has been filed in Appendix B of part 564 of this chapter;

(5) A warning that ballast output voltage presents the potential for severe electrical shock that could lead to permanent injury or death;

(6) Ballast output power in watts and output voltage in rms volts AC or DC; and

(7) The symbol "DOT".

(f) For light sources that use excited gas mixtures as a filament or discharge arc, the "rated laboratory life" shall be determined in accordance with sections 4.3 and 4.9 of SAE Recommended Practice J2009 FEB93 Forward Discharge Lighting Systems.

(g) After the force deflection test conducted in accordance with S9, the permanent deflection of the glass envelope shall not exceed 0.13 mm in the direction of the applied force.

Panda Power did not describe the noncompliances in detail, instead it deferred to the agency's concern that the subject HID headlamp kits may not comply with one or more of the regulations enforced by the agency. This concern was described as an apparent noncompliance in a letter sent to Panda Power dated September 2, 2009. The letter was sent to Panda Power as part of a National Highway Traffic Safety Administration (NHTSA) Office of

Vehicle Safety Compliance Office Activity.³

In the petition Panda Power argues that the noncompliance is inconsequential to motor vehicle safety for the following reasons: (1) The kits were originally intended for sale to the agricultural community to be placed on tractors and combines, for off-road vehicles, and for exhibition purposes; (2) the HID bulbs that were sold with the kits in 2007 and 2008 are likely burned out by now and no longer functioning; and (3) Panda Power no longer sells the headlamp kits.

Supported by the above stated reasons, Panda Power believes that the described FMVSS No. 108 noncompliance is inconsequential to motor vehicle safety, and that its petition, to exempt it from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and remedying the recall noncompliance as required by 49 U.S.C. 30120, should be granted.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance.

Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods:

a. *By mail addressed to:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

b. *By hand delivery to* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The Docket Section is open on weekdays from 10 am to 5 pm except Federal holidays.

c. *Electronically:* by logging onto the Federal Docket Management System (FDMS) Web site at <http://www.regulations.gov/>. Follow the online instructions for submitting comments. Comments may also be faxed to 1-202-493-2251.

Comments must be written in the English language, and be no greater than

15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that your comments were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Documents submitted to a docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the Internet at <http://www.regulations.gov> by following the online instructions for accessing the dockets. DOT's complete Privacy Act Statement is available for review in the **Federal Register** published on April 11, 2000 (65 FR 19477-78).

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

DATES: Comment closing date: January 20, 2011.

Authority: 49 U.S.C. 30118, 30120; delegations of authority at CFR 1.50 and 501.8.

Issued on: December 15, 2010.

Claude H. Harris,
Acting Associate Administrator for Enforcement.

[FR Doc. 2010-32010 Filed 12-20-10; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

December 15, 2010.

The Department of the Treasury is planning to submit the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11020, 1750

³ Office Activity Number: OA-108-090606G.

Pennsylvania Avenue, NW.,
Washington, DC 20220.

DATES: Written comments should be received on or before February 22, 2011 to be assured of consideration.

HR Connect

OMB Number: 1505–0225.

Type of Review: Renewal.

Title: Information on Processing Garnishment Orders.

Description: On April 19, 2010 Treasury, SSA, VA, RRB and OPM published a proposed rule to implement statutory restriction on the garnishment of Federal benefits. The Agencies took this action to alleviate the hardships being experienced by recipients of Federal benefit payments, which are statutorily exempt from garnishment, and to establish procedures for financial institutions to follow so that they are not compelled to freeze funds in an account as a result of the receipt of a court ordered garnishment. This collection of information is needed so that Treasury can gain a thorough understanding of the existing processing of court ordered garnishments served specifically on credit unions. The information obtained is necessary to devise a workable solution that balances the interests of individuals receiving federal benefit payments, which are statutorily exempt from garnishment, and financial institutions which provide deposit accounts.

Respondents: Businesses or other for-profit institutions, and not-for-profit institutions.

Estimated Total Reporting Burden: 260 hours.

Agency Contact: Barbara Wiss, (202) 622–5034, Room 1054, 1500 Pennsylvania Avenue, Washington, DC 20220.

Robert Dahl,

Treasury PRA Clearance Officer.

[FR Doc. 2010–32002 Filed 12–20–10; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Designation of Three Individuals and Seven Entities Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of ten newly designated individuals and entities whose property and interests in

property are blocked pursuant to Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism."

DATES: The designations by the Director of OFAC of the individuals identified in this notice, pursuant to Executive Order 13224, are effective on December 09, 2010.

FOR FURTHER INFORMATION CONTACT:

Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (<http://www.treas.gov/ofac>) or via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the "Order") pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c. In the Order, the President declared a national emergency to address grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001 terrorist attacks in New York, Pennsylvania, and at the Pentagon. The Order imposes economic sanctions on persons who have committed, pose a significant risk of committing, or support acts of terrorism. The President identified in the Annex to the Order, as amended by Executive Order 13268 of July 2, 2002, 13 individuals and 16 entities as subject to the economic sanctions. The Order was further amended by Executive Order 13284 of January 23, 2003, to reflect the creation of the Department of Homeland Security.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in or hereafter come within the United States or the possession or control of United States persons, of: (1) Foreign persons listed in the Annex to the Order; (2) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, to have committed, or to pose a significant risk of committing, acts of

terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States; (3) persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order; and (4) except as provided in section 5 of the Order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of the Department of Homeland Security and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Director of OFAC, in consultation with the Departments of State, Homeland Security and Justice, to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to the Order or determined to be subject to the Order or to be otherwise associated with those persons listed in the Annex to the Order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of the Order.

On December 9, 2010 the Director of OFAC, in consultation with the Departments of State, Homeland Security, Justice and other relevant agencies, designated, pursuant to one or more of the criteria set forth in subsections 1(b), 1(c) or 1(d) of the Order, three individuals and seven entities whose property and interests in property are blocked pursuant to Executive Order 13224.

The designees are as follows:

1. **TAJIDEEN, Ali** (a.k.a. TAGEDDINE, Ali Mohamed; a.k.a. TAJ AL DIN, Ali; a.k.a. TAJEDDIN, Ali Mohammad Abdel Hassan; a.k.a. TAJEDDIN, Ali Mohammad Abed Al-Hassan; a.k.a. TAJEDDINE, Ali); DOB 1961; alt. DOB 1963; POB Hanaway, Lebanon; alt. POB Hanouay, Lebanon; alt. POB Hanawiya, Lebanon; nationality Lebanon (individual) [SDGT]
2. **TAJIDEEN, Husayn** (a.k.a. TAJ AL DIN, Husayn; a.k.a. TAJIDEEN, Hussein; a.k.a. TAJIDINE, Hajj Hussein), The Gambia; DOB 1963 (individual) [SDGT]
3. **WEHBE, Bilal Mohsen** (a.k.a. WAHBE, Bilal; a.k.a. WAHBI, Bilal Muhsin; a.k.a. WAHBI, Bilal Mohsen; a.k.a. WAHBI, Muhsin Bilal; a.k.a. WEHBI, Bilal Mohsem;

- a.k.a. WEHBI, Bilal Mohsen; a.k.a. WIHBI, Bilal Muhsin), Avenida Jose Maria de Brito 929, Centro,, Foz Do Iguaçu, Parana State, Brazil; DOB 7 Jan 1967; Identification Number 77688048 (Brazil); Passport CZ74340 (Brazil); alt. Passport 0083628 (Lebanon); Shaykh (individual) [SDGT]
4. AFRI BELG COMMERCIO E INDUSTRIA LDA (a.k.a. AFRI BELG; a.k.a. AFRI-BELG; a.k.a. AFRI-BELG AGRICULTURE; a.k.a. AFRI-BELG CONSTRUCTION; a.k.a. AFRI-BELG SUPERMERCADOS; a.k.a. CASH & CARRY RETAIL STORES), Rua Comandante Valodia 266–268, Sao Paulo, Luanda, Angola; Avenida Comandante De Valodia n. 0.67, 1 Andar, Luanda, Angola; Email Address afribelg@snte.co.ao; Website www.grupoarosfran.net; (Afri-Belg Supermercados, Cash & Carry Retail Stores, Afri-belg Construction and Afri-Belg Agriculture are subsidiaries of Afri Belg Comercio E Industria Lda and operated from the same business address) [SDGT]
5. CONGO FUTUR (a.k.a. CONGO FUTUR IMPORT; a.k.a. CONGO FUTURE; a.k.a. GROUPE CONGO FUTUR), Avenue du Flambeau 389, Kinshasa, Congo, Democratic Republic of the; Future Tower, 3462 Boulevard du 30 Juin, Gombe, Kinshasa, Congo, Democratic Republic of the; Website www.congofutur.com [SDGT]
6. GOLFRATE HOLDINGS (ANGOLA) LDA (a.k.a. GOLFRATE; a.k.a. GOLFRATE AFRICA; a.k.a. GOLFRATE DISTRIBUTION; a.k.a. GOLFRATE FOOD INDUSTRIES; a.k.a. GOLFRATE HPC INDUSTRIES; a.k.a. GOLFRATE PAINTS (TINTAS DE DYRUP)), Avenida 4 de Fevereiro No. 13, C.P. 6172, Luanda, Angola; Avenida 4 de Fevereiro 13 R/N, Luanda, Angola; Av. 4 de Fevereiro no 13 R/C, Luanda, Angola; Email Address qassim@golfrate.com; alt. Email Address golfrategrupo@ebonet.net; alt. Email Address info@golfrateangola.com; Website www.golfrateangola.com; (Golfrate Distribution, Golfrate Food Industries, Golfrate HPC Industries and Golfrate Paints (Tintas de Dyrup) are subsidiaries of Golfrate Holdings (Angola) Lda and operate from the same business address as Golfrate Holdings (Angola) Lda.) [SDGT]
7. GRUPO AROSFRAN EMPREENDIMENTOS E PARTICIPACOES SARL (a.k.a. AROSFRAN; a.k.a. GRUPO AROSFRAM; a.k.a. GRUPO AROSFRAN), Rua Comandante de Volodia, No 67, Primeiro Andar, Luanda, Angola; 1st Floor, Avenida Comandante Valodia, No. 65, Luanda, Angola; Rua Clube Maritimo Africano, No 22 r/c, Luanda, Angola; Avenida Comandante de Valodia, No. 0.67, 1 Andar, Luanda, Angola; Rua General Rocadas 5, Luanda, Angola; Email Address arosfram@netangola.com; alt. Email Address arosfran@netangola.com; alt. Email Address info@grupoarosfran.net; Website www.grupoarosfran.net [SDGT]
8. KAIRABA SUPERMARKET (a.k.a. KAIRABA SHOPPING CENTER), Kairaba Ave, P.O. Box 2176, Banjul, The Gambia; 62 Buckle Street, Banjul, The Gambia; Pipeline Road, Banjul, The Gambia [SDGT]
9. OVLAS TRADING S.A. (a.k.a. OVLAS TRADING S.A.L.), Al Salia Building, Embassy Street, Bir Hassan, Beirut, Lebanon; Akara Building, 24 De Castro Street, Wickhams Cay 1, Road Town, Tortola, Virgin Islands, British; Website www.ovlas-trading.com [SDGT]
10. TAJCO (a.k.a. TAJCO COMPANY; a.k.a. TAJCO COMPANY LLC; a.k.a. TAJCO LTD; a.k.a. TAJCO SARL; a.k.a. TRADEX CO), 1 Picton Street, Banjul, The Gambia; Dohat Building 1st Floor, Liberation Avenue, Banjul, The Gambia; 62 Buckle Street, Banjul, The Gambia; Tajco Building, Main Street, Hannawiyah, Tyre, Lebanon; Tajco Building, Hanouay, Sour (Tyre), Lebanon; 30 Sani Abacha Street, Freetown, Sierra Leone; Website www.tajco-ltd.com; alt. Website www.tajcogambia.com; (Tradex Co. is a subsidiary of Tajco Company and operates from the same business address in Freetown, Sierra Leone as Tajco Company.) [SDGT]

Dated: December 9, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–32003 Filed 12–20–10; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of One Specially Designated National Pursuant to Executive Order 13224

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is removing the name of one individual from the list of Specially Designated Nationals and Blocked Persons whose property and interests in property have been blocked pursuant to Executive Order 13224 of September 23, 2001, *Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism*. The individual, Azahari BIN HUSIN was designated pursuant to Executive Order 13224 on September 5, 2003.

DATES: The removal of the individual from the list of Specially Designated Nationals and Blocked Persons whose property and interests in property have been blocked pursuant to Executive Order 13224 is effective as of Tuesday, December 14, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, *tel.*: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (<http://www.treas.gov/ofac>) or via facsimile through a 24-hour fax-on-demand service, *tel.*: 202/622–0077.

Background

On September 23, 2001, the President issued Executive Order 13224 (the "Order") pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the United Nations Participation Act of 1945, 22 U.S.C. 287c, imposing economic sanctions on persons who commit, threaten to commit, or support acts of terrorism. The President identified in the Annex to the Order various individuals and entities as subject to the economic sanctions. The Order authorizes the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and (pursuant to Executive Order 13284) the Secretary of the Department of

Homeland Security, to designate additional persons or entities determined to meet certain criteria set forth in Executive Order 13224.

On September 5, 2003, Azahari BIN HUSIN was designated by the Secretary of the Treasury. The Department of the Treasury's Office of Foreign Assets Control has determined that this individual no longer meets the criteria for designation under the Order and is appropriate for removal from the list of Specially Designated Nationals and Blocked Persons.

The following designation is removed from the list of Specially Designated Nationals and Blocked Persons:

BIN HUSIN, Azahari (a.k.a. BIN HUSAN, Azahari; a.k.a. HUSIN, Azahari); DOB 14 Sep 1957; POB Malaysia; nationality Malaysia (individual) [SDGT]

The removal of this one individual's name from the list of Specially Designated Nationals and Blocked Persons is effective as of Thursday, December 14, 2010. All property and interests in property of the individual that are in or hereafter come within the United States or the possession or control of United States persons are now unblocked.

Dated: December 14, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010-32004 Filed 12-20-10; 8:45 am]

BILLING CODE 4810-AL-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0624]

Agency Information Collection (Obligation To Report Factors Affecting Entitlement) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or January 20, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0624" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, FAX (202) 461-0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0624."

SUPPLEMENTARY INFORMATION:

Title: Obligation to Report Factors Affecting Entitlement (38 CFR 3.204(a)(1), 38 CFR 3.256(a) and 38 CFR 3.277(b)).

OMB Control Number: 2900-0624.

Type of Review: Extension of a currently approved collection.

Abstract: Claimants who applied for or receives compensation, pension or dependency and indemnity compensation benefits must report changes in their entitlement factors. Individual factors such as income, marital status, and the beneficiary's number of dependents, may affect the amount of benefit that he or she receives or affect the right to receive such benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 12, 2010, at page 62634.

Affected Public: Individuals or households.

Estimated Annual Burden: 31,017 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 372,209.

Dated: December 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010-31912 Filed 12-20-10; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0500]

Agency Information Collection (Status of Dependents Questionnaire) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 20, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0500" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, FAX (202) 461-0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0500."

SUPPLEMENTARY INFORMATION:

Title: Status of Dependents Questionnaire, VA Form 21-0538.

OMB Control Number: 2900-0500.

Type of Review: Extension of a currently approved collection.

Abstract: Veterans receiving compensation for service-connected disability which includes an additional amount for their spouse and/or child(ren) complete VA Form 21-0538 to certify the status of the dependents for whom additional compensation is being paid.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 12, 2010, at pages 62636-62637.

Affected Public: Individuals or households.

Estimated Annual Burden: 14,083 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Once every eight years.

Estimated Number of Respondents: 84,500.

Dated: December 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010-31913 Filed 12-20-10; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0036]

Agency Information Collection (Statement of Disappearance) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501-3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 20, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-7316. Please refer to "OMB Control No. 2900-0036" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-7485, FAX (202) 461-0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900-0036."

SUPPLEMENTARY INFORMATION:

Title: Statement of Disappearance, VA Form 21-1775.

OMB Control Number: 2900-0036.

Type of Review: Extension of a previously approved collection.

Abstract: VA Form 21-1775 is used to gather information from a claimant to make a decision regarding the unexplained absence of a veteran for over 7 years. The data collected will be used to determine the claimant's entitlement to death benefits.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 12, 2010, at pages 62634-62635.

Affected Public: Individuals or households.

Estimated Annual Burden: 28 hours.

Estimated Average Burden per Respondent: 2 hours 45 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents: 10.

Dated: December 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010-31914 Filed 12-20-10; 8:45 am]

BILLING CODE 8320-01-P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0657]

Proposed Information Collection (Conflicting Interests Certification for Proprietary Schools Only) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to ensure State approving agency and VA employees do not own any interest in a proprietary profit school.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before February 22, 2011.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at <http://www.Regulations.gov> or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail nancy.kessinger@va.gov. Please refer to "OMB Control No. 2900-0657" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT:

Nancy J. Kessinger at (202) 461-9769 or FAX (202) 275-5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104-13; 44 U.S.C. 3501-3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Conflicting Interests Certification for Proprietary Schools Only, VA Form 22-1919.

OMB Control Number: 2900-0657.

Type of Review: Extension of a currently approved collection.

Abstract: VA pays education benefits to veterans and other eligible person pursuing approved programs of education. Employees of VA and State approving agency enrolled in a proprietary profit school are prohibit from owning any interest in the school. Educational assistance provided to veterans or eligible person based on their enrollment in proprietary school and who are officials authorized to signed certificates of enrollment are also prohibit from receiving educational assistance based on their enrollment.

Proprietary schools officials complete VA Form 22–1919 certifying that the institution and enrollees do not have any conflict of interest.

Affected Public: Business or other for profit.

Estimated Annual Burden: 105 hours.

Estimated Average Burden per

Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 631.

Dated: December 15, 2010.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–31915 Filed 12–20–10; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0253]

Agency Information Collection (Nonsupervised Lender's Nomination and Recommendation of Credit Underwriter) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice

announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 20, 2011.

ADDRESSES: Submit written comments on the collection of information through <http://www.Regulations.gov> or to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503, (202) 395–7316. Please refer to "OMB Control No. 2900–0253" in any correspondence.

FOR FURTHER INFORMATION CONTACT:

Denise McLamb, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461–7485, FAX (202) 461–0966 or e-mail denise.mclamb@va.gov. Please refer to "OMB Control No. 2900–0253."

SUPPLEMENTARY INFORMATION:

Title: Nonsupervised Lender's Nomination and Recommendation of Credit Underwriter, VA Form 26–8736a. *OMB Control Number:* 2900–0253.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 26–8736a is completed by nonsupervised lender's

and the lender's nominee for credit underwriting with the Department of Veterans Affairs. Lenders are authorized by VA to make automatic guaranteed loans if approved for such purposes. The lender is required to have a qualified underwriter to review loans to be closed on automatic basis and determine that the loan meets VA's credit underwriting standards. VA uses the data collected on the form to evaluate the nominee's credit underwriting experience.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 12, 2010, at pages 62633–62634.

Affected Public: Business or other for-profit.

Estimated Annual Burden: 1,000 hours.

Estimated Average Burden per Respondent: 20 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3,000.

By direction of the Secretary.

Dated: December 15, 2010.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2010–31916 Filed 12–20–10; 8:45 am]

BILLING CODE 8320–01–P



Federal Register

**Tuesday,
December 21, 2010**

Part II

Environmental Protection Agency

40 CFR Part 51

**Methods for Measurement of Filterable
PM₁₀ and PM_{2.5} and Measurement of
Condensable PM Emissions From
Stationary Sources; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 51**

[EPA-HQ-OAR-2008-0348; FRL-9236-2]

RIN 2060-AO58

Methods for Measurement of Filterable PM₁₀ and PM_{2.5} and Measurement of Condensable PM Emissions From Stationary Sources**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: This action promulgates amendments to Methods 201A and 202. The final amendments to Method 201A add a particle-sizing device to allow for sampling of particulate matter with mean aerodynamic diameters less than or equal to 2.5 micrometers (PM_{2.5} or fine particulate matter). The final amendments to Method 202 revise the sample collection and recovery procedures of the method to reduce the formation of reaction artifacts that could lead to inaccurate measurements of condensable particulate matter. Additionally, the final amendments to Method 202 eliminate most of the hardware and analytical options in the existing method, thereby increasing the precision of the method and improving the consistency in the measurements obtained between source tests performed under different regulatory authorities.

This action also announces that EPA is taking no action to affect the already established January 1, 2011 sunset date for the New Source Review (NSR) transition period, during which EPA is not requiring that State NSR programs address condensable particulate matter emissions.

DATES: This final action is effective on January 1, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2008-0348. All documents are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy form. Publicly available docket materials are available either electronically at <http://www.regulations.gov> or in hard copy at the EPA Docket Center EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading

Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air Docket Center is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: For general information, contact Ms. Candace Sorrell, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Assessment Division, Measurement Technology Group (E143-02), Research Triangle Park, NC 27711; telephone number: (919) 541-1064; fax number: (919) 541-0516; e-mail address: sorrell.candace@epa.gov. For technical questions, contact Mr. Ron Myers, U.S. EPA, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Measurement Policy Group (D243-05), Research Triangle Park, NC 27711; telephone number: (919) 541-5407; fax number: (919) 541-1039; e-mail address: myers.ron@epa.gov.

SUPPLEMENTARY INFORMATION:

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

Δp_{\max} maximum velocity pressure
 Δp_{\min} minimum velocity pressure
 μm micrometers
 ASTM American Society for Testing and Materials
 AWMA Air and Waste Management Association
 CAA Clean Air Act
 CBI confidential business information
 CCM Controlled Condensation Method
 CPM condensable PM
 DOP dioctyl phthalate
 DOT Department of Transportation
 DQO data quality objective
 MSHA Mine Safety and Health Administration
 NAAQS National Ambient Air Quality Standards
 NSR New Source Review
 NTTAA National Technology Transfer and Advancement Act of 1995
 OSHA Occupational Safety and Health Administration
 PCB polychlorinated biphenyl
 PM particulate matter
 PM₁₀ particulate matter less than or equal to 10 micrometers
 PM_{2.5} particulate matter less than or equal to 2.5 micrometers
 ppmw parts per million by weight
 PTFE polytetrafluoropolymer
 RCRA Resource Conservation and Recovery Act
 RFA Regulatory Flexibility Act
 SBA Small Business Administration
 SIP State Implementation Plan
 SO₂ sulfur dioxide
 TDS total dissolved solids
 TTN Technology Transfer Network
 UMRA Unfunded Mandates Reform Act
 www World Wide Web

The information in this preamble is organized as follows:

I. General Information

- A. Does this action apply to me?
- B. Where can I obtain a copy of this action and other related information?
- C. What is the effective date?
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 - A. Why is EPA issuing this final action?
 - B. Particulate Matter National Ambient Air Quality Standards
 - C. Measuring PM Emissions
 - 1. Method 201A
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- III. Summary of Changes Since Proposal
 - A. Method 201A
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 - G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act
 - J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
 - K. Congressional Review Act

I. General Information*A. Does this action apply to me?*

This action applies to you if you operate a stationary source that is subject to applicable requirements to control or measure total particulate matter (PM), total PM with mean aerodynamic diameters less than or equal to 10 micrometers (μm) (PM₁₀), or total PM_{2.5}, where EPA Method 202 is incorporated as a component of the applicable test method.

In addition, this action applies to you if federal, State, or local agencies take certain additional independent actions. For example, this action applies to sources through actions by State and local agencies that implement condensable PM (CPM) control measures to attain the National Ambient

Air Quality Standards (NAAQS) for PM_{2.5} and specify the use of Method 202 to demonstrate compliance with the control measures. State and local agencies that specify the use of Method 201A or 202 would have to implement the following: (1) Adopt this method in rules or permits (either by incorporation by reference or by duplicating the

method in its entirety), and (2) promulgate an emissions limit requiring the use of Method 201A or 202 (or an incorporated method based upon Method 201A or 202). This action also applies to stationary sources that are required to meet new applicable CPM requirements established through federal or State permits or rules, such as

New Source Performance Standards and New Source Review (NSR), which specify the use of Method 201A or 202 to demonstrate compliance with the control measures.

The source categories and entities potentially affected include, but are not limited to, the following:

Category	NAICS ^a	Examples of regulated entities
Industry	332410	Fossil fuel steam generators.
	332410	Industrial, commercial, institutional steam generating units.
	332410	Electricity generating units.
	324110	Petroleum refineries.
	562213	Municipal waste combustors.
	322110	Pulp and paper mills.
	325188	Sulfuric acid plants.
	327310	Portland cement plants.
	327410	Lime manufacturing plants.
	211111, 212111, 212112, 212113	Coal preparation plants.
	331312, 331314	Primary and secondary aluminum plants.
	331111, 331513	Iron and steel plants.
	321219, 321211, 321212	Plywood and reconstituted products plants.

^aNorth American Industrial Classification System.

B. Where can I obtain a copy of this action and other related information?

In addition to being available in the docket, an electronic copy of these final rules are also available on the World Wide Web (<http://www.epa.gov/ttn/>) through the Technology Transfer Network (TTN). Following the Administrator's signature, a copy of these final rules will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at <http://www.epa.gov/ttn/oarpg>. The TTN provides information and technology exchange in various areas of air pollution control.

C. What is the effective date?

The final rule amendments are effective on January 1, 2011. Section 553(d) of the Administrative Procedure Act (APA), 5 U.S.C. Chapter 5, generally provides that rules may not take effect earlier than 30 days after they are published in the **Federal Register**. EPA is issuing this final rule under section 307(d)(1) of the Clean Air Act, which states: "The provisions of section 553 through 557 * * * of Title 5 shall not, except as expressly provided in this section, apply to actions to which this subsection applies." Thus, section 553(d) of the APA does not apply to this rule. EPA is nevertheless acting consistently with the purposes underlying APA section 553(d) in making this rule effective on January 1, 2011. Section 5 U.S.C. 553(d)(3) allows an effective date less than 30 days after publication "as otherwise provided by the agency for good cause found and

published with the rule." As explained below, EPA finds that there is good cause for these rules to become effective on or before January 1, 2011, even if this date is not 30 days from date of publication in the **Federal Register**.

While this action is being signed prior to December 1, 2010, there may be a delay in the publication of this rule as it contains many complex diagrams, equations, and charts, and is relatively long in length. The purpose of the 30-day waiting period prescribed in 5 U.S.C. 553(d) is to give affected parties a reasonable time to adjust their behavior and prepare before the final rule takes effect. Where, as here, the final rule will be signed and made available on the EPA website more than 30 days before the effective date, but where the publication may be delayed due to the complexity and length of the rule, that purpose is still met. Moreover, since permitting authorities and regulated entities may need to rely on the methods described in these rules to carry out requirements of the SIP and NSR implementation rules that become effective on January 1, 2011 (*see* section III.C, *infra*), there would be unnecessary regulatory confusion if a publication delay caused this rule to become effective after January 1, 2011. Accordingly, we find good cause exists to make this rule effective on or before January 1, 2011, consistent with the purposes of 5 U.S.C. 553(d)(3).¹

¹ We recognize that this rule could be published at least 30 days before January 1, 2011, which would negate the need for this good cause finding, and we plan to request expedited publication of this rule in order to decrease the likelihood of a

D. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit by February 22, 2011. Under CAA section 307(b)(2), the requirements established by this action may not be challenged separately in any civil or criminal proceedings brought by EPA to enforce these requirements.

Section 307(d)(7)(B) of the CAA further provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review." This section also provides a mechanism for EPA to convene a proceeding for reconsideration, "[i]f the person raising an objection can demonstrate to EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule." Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000,

publication delay. However, as we cannot know the date of publication in advance of signing this rule, we are proceeding with this good cause finding for an effective date on or before January 1, 2011, in an abundance of caution in order to avoid the unnecessary regulatory confusion noted above.

Ariel Rios Building, 1200 Pennsylvania Ave., NW., Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

II. Background

A. Why is EPA issuing this final action?

Section 110 of the CAA, as amended (42 U.S.C. 7410), requires State and local air pollution control agencies to develop, and submit for EPA approval, State Implementation Plans (SIP) that provide for the attainment, maintenance, and enforcement of the NAAQS in each air quality control region (or portion thereof) within each State. The emissions inventories and analyses used in the State's attainment demonstrations must consider PM₁₀ and PM_{2.5} emissions from stationary sources that are significant contributors of primary PM₁₀ and PM_{2.5} emissions. Primary or direct emissions are the solid particles or liquid droplets emitted directly from an air emissions source or activity, and the gaseous emissions or liquid droplets from an air emissions source or activity that condense to form PM or liquid droplets at ambient temperatures.

Appendix A to subpart A of 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans) defines primary PM₁₀ and PM_{2.5} as including both the filterable and condensable fractions of PM. Filterable PM consists of those particles that are directly emitted by a source as a solid or liquid at the stack (or similar release conditions) and captured on the filter of a stack test train. Condensable PM is the material that is in vapor phase at stack conditions but condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. In response to the need to quantify primary PM₁₀ and PM_{2.5} emissions from stationary sources, EPA previously developed and promulgated Method 201A (Determination of PM₁₀ Emissions (Constant Sampling Rate Procedure)) and Method 202 (Determination of Condensable Particulate Emissions from Stationary Sources) in 40 CFR part 51, appendix M (Recommended Test Methods for State Implementation Plans).

On April 17, 1990 (56 FR 65433), EPA promulgated Method 201A in appendix M of 40 CFR part 51 to provide a test

method for measuring filterable PM₁₀ emissions from stationary sources. In EPA Method 201A, a gas sample is extracted at a constant flow rate through an in-stack sizing device that directs particles with aerodynamic diameters less than or equal to 10 µm to a filter. The particulate mass collected on the filter is determined gravimetrically after removal of uncombined water.

On December 17, 1991 (56 FR 65433), EPA promulgated Method 202 in appendix M of 40 CFR part 51 to provide a test method for measuring CPM from stationary sources. Method 202 uses water-filled impingers to cool, condense, and collect materials that are vaporous at stack conditions and become solid or liquid PM at ambient air temperatures. Method 202, as promulgated in 1991, contains several optional procedures that were intended to accommodate the various test methods used by State and local regulatory entities at the time Method 202 was being developed.

In this action, we are finalizing amendments to Methods 201A and 202 to improve the measurement of fine PM emissions. For Method 201A, the final amendments add a particle-sizing device to allow for sampling of PM_{2.5} emissions. For Method 202, the final amendments will (1) revise the sample collection and recovery procedures of the method to reduce the potential for formation of reaction artifacts that are not related to the primary emission of CPM from the source but may be counted erroneously as CPM when using Method 202, and (2) eliminate most of the hardware and analytical options in the existing method. These changes increase the precision of Method 202 and improve the consistency in the measurements obtained between source tests performed under different regulatory authorities.

B. Particulate Matter National Ambient Air Quality Standards

Section 108 and 109 of the CAA govern the establishment and revision of the NAAQS. Section 108 of the CAA (42 U.S.C. 7408) directs the Administrator to identify and list "air pollutants" that "in his judgment, may reasonably be anticipated to endanger public health and welfare" and whose "presence * * * in the ambient air results from numerous or diverse mobile or stationary sources" and to issue air quality criteria for those that are listed. Air quality criteria are intended to "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of identifiable effects on public health or welfare which may be

expected from the presence of [a] pollutant in ambient air * * *." Section 109 of the CAA (42 U.S.C. 7409) directs the Administrator to propose and promulgate primary and secondary NAAQS for pollutants listed under CAA section 108 to protect public health and welfare, respectively. Section 109 of the CAA also requires review of the NAAQS at 5-year intervals and that an independent scientific review committee "shall complete a review of the criteria * * * and the national primary and secondary ambient air quality standards * * * and shall recommend to the Administrator any new * * * standards and revisions of existing criteria and standards as may be appropriate * * *." Since the early 1980s, this independent review function has been performed by the Clean Air Scientific Advisory Committee.

Initially, EPA established the PM NAAQS on April 30, 1971 (36 FR 8186), based on the original criteria document (Department of Health, Education, and Welfare, 1969). The reference method specified for determining attainment of the original standards was the high-volume sampler, which collects PM up to a nominal size of 25 to 45 µm (referred to as total suspended particulates or TSP). On October 2, 1979 (44 FR 56730), EPA announced the first periodic review of the air quality criteria and PM NAAQS, and significant revisions to the original standards were promulgated on July 1, 1987 (52 FR 24634). In that decision, EPA changed the indicator for particles from TSP to PM₁₀. When that rule was challenged, the court upheld revised standards in all respects. *Natural Resources Defense Council v. Administrator*, 902 F. 2d 962 (D.C. Cir. 1990, cert. denied, 498 U.S. 1082 (1991)).

In April 1994, EPA announced its plans for the second periodic review of the air quality criteria and PM NAAQS, and the Agency promulgated significant revisions to the NAAQS on July 18, 1997 (62 FR 38652). In that decision, EPA revised the PM NAAQS in several respects. While EPA determined that the PM NAAQS should continue to focus on particles less than or equal to 10 µm in diameter (PM₁₀), EPA also determined that the fine and coarse fractions of PM₁₀ should be considered separately. EPA added new standards, using PM_{2.5} as the indicator for fine particles (with PM_{2.5} referring to particles with a nominal mean aerodynamic diameter less than or equal to 2.5 µm), and using PM₁₀ as the indicator for purposes of regulating the coarse fraction of PM₁₀.

Following promulgation of the 1997 PM NAAQS, petitions for review were filed by a large number of parties

addressing a broad range of issues. In May 1999, a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit issued an initial decision that upheld EPA's decision to establish fine particle standards. *American Trucking Associations v. EPA*, 175 F.3d 1027, 1055 (D.C. Cir. 1999), reversed in part on other grounds in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). The panel also found "ample support" for EPA's decision to regulate coarse particle pollution, but vacated the 1997 PM₁₀ standards concluding that EPA had not provided a reasonable explanation justifying use of PM₁₀ as an indicator for coarse particles. (Id. at 1054–55.) Pursuant to the court's decision, EPA removed the vacated 1997 PM₁₀ standards but retained the pre-existing 1987 PM₁₀ standards (65 FR 80776, December 22, 2000).

On October 23, 1997, EPA published its plans for the third periodic review of the air quality criteria and PM NAAQS (62 FR 55201), including the 1997 PM_{2.5} standards and the 1987 PM₁₀ standards. On October 17, 2006, EPA issued its final decision to revise the primary and secondary PM NAAQS to provide increased protection of public health and welfare respectively (71 FR 61144). With regard to the primary and secondary standards for fine particles, EPA revised the level of the 24-hour PM_{2.5} standard to 35 µg per cubic meter (µg/m³), retained the level of the annual PM_{2.5} annual standard at 15 µg/m³, and revised the form of the annual PM_{2.5} standard by narrowing the constraints on the optional use of spatial averaging. With regard to the primary and secondary standards for PM₁₀, EPA retained the 24-hour PM₁₀ standard (150 µg/m³) and revoked the annual standard because available evidence generally did not suggest a link between long-term exposure to current ambient levels of coarse particles and health or welfare effects.

C. Measuring PM Emissions

Section 110 of the CAA, as amended (42 U.S.C. 7410), requires State and local air pollution control agencies to develop and submit plans (SIP) for EPA approval that provide for the attainment, maintenance, and enforcement of the NAAQS in each air quality control region (or portion thereof) within such State. 40 CFR part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans) specifies the requirements for SIP. Appendix A to subpart A of 40 CFR part 51, defines primary PM₁₀ and PM_{2.5} as including both the filterable and condensable

fractions of PM. Filterable PM consists of those particles directly emitted by a source as a solid or liquid at the stack (or similar release conditions) and captured on the filter of a stack test train. Condensable PM is the material that is in vapor phase at stack conditions but which condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack.

Promulgation of the 1987 NAAQS created the need for methods to quantify PM₁₀ emissions from stationary sources. In response, EPA developed and promulgated the following test methods:

- Method 201A—Determination of PM₁₀ Emissions (Constant Sampling Rate Procedure), and
- Method 202—Determination of Condensable Particulate Emissions from Stationary Sources.

1. Method 201A

Method 201A is a test method for measuring filterable PM₁₀ emissions from stationary sources. With the exception of the PM₁₀-sizing device, the current Method 201A sampling train is the same as the sampling train used for EPA Method 17 of appendix A–3 to 40 CFR part 60.

Method 201A cannot be used to measure emissions from stacks that have entrained moisture droplets (e.g., from a wet scrubber stack) since these stacks may have water droplets that are larger than the cut size of the PM₁₀ sizing device. The presence of moisture would prevent an accurate measurement of total PM₁₀ since any PM₁₀ dissolved in larger water droplets would not be collected by the sizing device and would consequently be excluded in determining total PM₁₀ mass. To measure PM₁₀ in stacks where water droplets are known to exist, EPA's Technical Information Document 09 (Methods 201 and 201A in Presence of Water Droplets) recommends use of Method 5 of appendix A–3 to 40 CFR part 60 (or a comparable method) and consideration of the total particulate catch as PM₁₀ emissions.

Method 201A is also not applicable for stacks with small diameters (*i.e.*, 18 inches or less). The presence of the in-stack nozzle/cyclones and filter assembly in a small duct will cause significant cross-sectional area interference and blockage leading to incorrect flow calculation and particle size separation. Additionally, the type of metal used to construct the Method 201A cyclone may limit the applicability of the method when sampling at high stack temperatures (*e.g.*, stainless steel cyclones are

reported to gall and seize at temperatures greater than 260 °C).

2. Method 202

Method 202 measures CPM from stationary sources. Method 202 contains several optional procedures that were intended to accommodate the various test methods used by State and local regulatory entities at the time Method 202 was being developed.

When conducted consistently and carefully, Method 202 provides acceptable precision for most emission sources. Method 202 has been used successfully in regulatory programs where the emission limits and compliance demonstrations are established based on a consistent application of the method and its associated options. However, when the same emission source is tested using different combinations of the optional procedures, there appears to be large variations in the measured CPM emissions. Additionally, during validation of the promulgated method, we determined that sulfur dioxide (SO₂) gas (a typical component of emissions from several types of stationary sources) can be absorbed partially in the impinger solutions and can react chemically to form sulfuric acid. This sulfuric acid "artifact" is not related to the primary emission of CPM from the source, but may be counted erroneously as CPM when using Method 202. We consistently maintain that the artifact formation can be reduced by at least 90 percent if a one-hour nitrogen purge of the impinger water is used to remove SO₂ before it can form sulfuric acid (this is our preferred application of the Method 202 optional procedures). Inappropriate use or omission of the preferred or optional procedures in Method 202 can increase the potential for artifact formation.

Considering the potential for variations in measured CPM emissions, we believe that further verification and refinement of Method 202 is appropriate to minimize the potential for artifact formation. We performed several studies to assess artifact formation when using Method 202. The results of our 1998 laboratory study and field evaluation commissioned to evaluate the impinger approach can be found in "Laboratory and Field Evaluation of EPA's Method 5 Impinger Catch for Measuring Condensable Matter from Stationary Sources" at <http://www.epa.gov/ttn/emc/methods/m202doc1.pdf>.

The 1998 study verified the need for a nitrogen purge when SO₂ is present in stack gas and provided guidance for analyzing the collected samples. In 2005, an EPA contractor conducted a

second study, "Laboratory Evaluation of Method 202 to Determine Fate of SO₂ in Impinger Water," that replicated some of the earlier EPA work and addressed some additional issues. The report of that work is available at <http://www.epa.gov/ttn/emc/methods/m202doc2.pdf>. This report also verified the need for a nitrogen purge and identified the primary factors that affect artifact formation.

Also in 2005, a private testing contractor presented a possible minor modification to Method 202 at the Air and Waste Management Association (AWMA) specialty conference. The proposed modification, as described in their presentation titled "Optimized Method 202 Sampling Train to Minimize the Biases Associated with Method 202 Measurement of Condensable Particulate Matter Emissions," involved the elimination of water from the first impingers. The presentation (available at <http://www.epa.gov/ttn/emc/methods/m202doc3.pdf>) concluded that modification of the promulgated method to use dry impingers resulted in a significant additional reduction in the sulfate artifact.

In 2006, we began to conduct laboratory studies in collaboration with several stakeholders to characterize the artifact formation and other uncertainties associated with conducting Method 202 and to identify procedures that would minimize uncertainties when using Method 202. Since August 2006, we conducted two workshops in Research Triangle Park, NC to present and request comments on our plan for evaluating potential modifications to Method 202 that would reduce artifact formation, and also to discuss (1) Our progress in characterizing the performance of the modified method, (2) issues that require additional investigation, (3) the results of our laboratory studies, and (4) our commitments to extend the investigation through stakeholders external to EPA. Another meeting was held with experienced stack testers and vendors of emissions monitoring equipment to discuss hardware issues associated with modifications of the sampling equipment and the glassware for the proposed CPM test method. Summaries of the method evaluations, as well as meeting minutes from our workshops, can be found at <http://www.epa.gov/ttn/emc/methods/method202.html>.

The laboratory studies that were performed fulfill a commitment in the preamble to the Clean Air Fine Particle Implementation Rule (72 FR 20586, April 25, 2007) to examine the

relationship between several critical CPM sampling and analysis parameters and, to the extent necessary, promulgate revisions to incorporate improvements in the method. While these improvements in the stationary source test method for CPM will provide for more accurate and precise measurement of all PM, the addition of PM_{2.5} as an indicator of health and welfare effects by the 1997 NAAQS revisions generates the need to quantify PM_{2.5} emissions from stationary sources. To respond to this need, we are promulgating revisions to incorporate this capability into the test method for filterable PM₁₀.

III. Summary of Changes Since Proposal

The methods in this final action contain several changes that were made as a result of public comments. The following sections present a summary of the changes to the methods. We explain the reasons for these changes in detail in the Summary of Public Comments and Responses section of this preamble.

A. Method 201A

Method 201A contains the following changes and clarifications:

- Revised Section 1.5 to clarify that Method 201A cannot be used to measure emissions from stacks that have entrained moisture droplets (e.g., from a wet scrubber stack).
- Removed the language in proposed Section 1.5 regarding ambient air contributions to PM. The decision to correct results for ambient air contributions is up to the permitting or regulatory authority.
- Added definitions of Primary PM, Filterable PM, Primary PM_{2.5}, Primary PM₁₀, and CPM to Section 3.0.
- Added a requirement to Sections 6.1.3 and 8.6.3 stating that the filter must not be compressed between the gasket and the filter housing.
- Clarified the sample recovery and analysis equipment in Section 6.2, including acceptable materials of construction, analytical balance, and fluoropolymer (polytetrafluoroethylene) beaker liners.
- Revised Section 6.2 to add performance-based, residual mass contribution specifications for containers rather than specifying the type of container that must be used (storage containers must not contribute more than 0.1 mg of residual mass to the CPM measurements).
- Revised Section 8.3.1 (regarding sampling ports) to state that a 4-inch port should be adequate for the single PM_{2.5} (or single PM₁₀) sampling apparatus. However, testers will not be able to use conventional 4-inch ports if

the combined dimension of the PM₁₀ cyclone and the nozzle extending from the cyclone exceeds the internal diameter of the port.

- Clarified the sampling procedures in Section 8.3.1 for cases where the PM_{2.5} cyclone is used without the PM₁₀ cyclone. In these cases, samples are collected using the procedures specified in Section 11.3.2.2 of EPA Method 1, and the sampling time is extended at the replacement sampling point to include the duration of the unreachable traverse points.

- Revised Section 8.3.2.2 to clarify that Method 201A is not applicable for stack diameters less than 26.5 inches when the combined PM₁₀/PM_{2.5} cyclone is used. The in-stack nozzle/cyclones and filter assembly in stacks less than 26.5 inches in diameter would cause significant cross-sectional area interference and blockage, leading to incorrect flow calculation and particle size separation.

- Revised Section 8.5.5 to express the maximum failure rate of values outside the minimum-maximum velocity pressure range in terms of percent of values outside the range instead of the number of traverse points outside the range.

- Revised section 8.6.1 to clarify that alternative designs are acceptable for fastening caps or covers to cyclones to avoid galling of the cyclone component threads in hot stacks. The method may be used at temperatures up to 1,000°F using stainless steel cyclones that are bolted together, rather than screwed together. Using "break-away" stainless steel bolts facilitates disassembly and circumvents the problem of thread galling.

- Clarified sampling procedures in Section 8.7.3.3 to maintain the temperature of the cyclone sampling head within ± 10 °C of the stack temperature and to maintain flow until after removing and before inserting the sampling head.

- Revised Section 11.2.7 to allow the use of tared fluoropolymer beaker liners for the acetone field reagent blank.

B. Method 202

Method 202 contains the following changes and clarifications:

- Clarified the terminology used to refer to laboratory and field blanks throughout the method.
- For health and safety reasons, replaced the use of methylene chloride with hexane throughout the method.
- Clarified Section 1.2 by moving the discussion of filterable PM methods used in conjunction with Method 202 to Section 1.5.

- Clarified Section 1.6 to specify that Method 202 can be used for measuring CPM in stacks that contain entrained moisture if the sampling temperature is sufficiently high to keep the moisture in the vapor phase.

- Moved the recommendation to develop a health and safety plan from Section 9.4 to Section 5.0.

- Added amber glass bottles to the list of sample recovery equipment in Section 6.2.

- Added alternatives (fluoropolymer beaker liners or fluoropolymer baggies) to weighing tins to the list of analytical equipment in Section 6.2.2 (Section 6.3 of the proposed method).

- Added specifications for sample drying equipment in Section 6.2.2 (Section 6.3 of the proposed method).

- Clarified Section 6.3.7 regarding the use of an analytical balance with sensitivity to 0.00001 g (0.01 milligram).

- Added an option to use a colorimetric pH indicator instead of a pH meter in Section 6.2.2 (Section 6.3 of the proposed method).

- Added a sonication device to the list of analytical equipment in Section 6.2.2 (Section 6.3 of the proposed method).

- Added performance-based, residual mass contribution specifications for containers and wash bottles in Section 6.2.2 (Section 6.3 of the proposed method) rather than specifying the type of container that must be used.

- Replaced the prescriptive language regarding filter materials in Section 7.1.1 with performance-based requirements limiting the residual mass contribution.

- Replaced the prescriptive language regarding water quality in Section 7.1.3 with performance-based requirements for residual mass content.

- Clarified Section 8.2 to specify that cleaned glassware must be used at the start of each new source category tested at a single facility.

- Added a performance-based option to Section 8.4 to conduct a field train proof blank rather than meeting the glassware baking requirements in Section 8.2.

- Clarified the sampling train configuration for the nitrogen purge procedures in Section 8.5.3.2 regarding pressurized purges.

C. How will the final amendments to methods 201A and 202 affect existing emission inventories, emission standards, and permit programs?

We anticipate that over time the changes in the test methods finalized in this action will result in, among other positive outcomes, more accurate emissions inventories of direct PM

emissions and emissions standards that are more indicative of the actual impact of the source on the ambient air quality.

Accurate emission inventories are critical for regulatory agencies to develop the control strategies and demonstrations necessary to attain air quality standards. When implemented, the test method revisions should improve our understanding of PM emissions due to the increased availability of more accurate emission tests and eventually through the incorporation of less biased test data into existing emissions factors. For CPM, the use of the revised method could reveal a reduced level of CPM emissions from a source compared to the emissions that would have been measured using Method 202 as typically performed. However, there may be some cases where the revised test method would reveal an increased level of CPM emissions from a source, depending on the relative emissions of filterable and CPM emissions from the source. For example, the existing Method 202 allows complete evaporation of the water containing inorganic PM at 105 °C (221 °F), where the revised method requires the last 10 ml of the water to be evaporated at room temperature (not to exceed 30 °C (85 °F)), thereby retaining the CPM that would evaporate at the increased temperature.

Prior to our adoption of the 1997 PM_{2.5} NAAQS, several State and local air pollution control agencies had developed emission inventories that included CPM. Additionally, some agencies established enforceable CPM emissions limits or otherwise required that PM emissions testing include measurement of CPM. While this approach was viable in cases where the same test method was used to develop the CPM regulatory limits and to demonstrate facility compliance, there are substantial inconsistencies within and between States regarding the completeness and accuracy of CPM emission inventories and the test methods used to measure CPM emissions and demonstrate facility compliance.

These amendments would serve to mitigate the potential difficulties that can arise when EPA and other regulatory entities attempt to use the test data from State and local agencies with inconsistent CPM test methods to develop emission factors, determine program applicability, or to establish emissions limits for CPM emission sources within a particular jurisdiction. For example, problems can arise when the test method used to develop a CPM emission limit is not the same as the test method specified in the rule for

demonstrating compliance because the different test methods may quantify different components of PM (e.g., filterable versus condensable). Also, when emissions from State inventories are modeled to assess compliance with the NAAQS, the determination of direct PM emissions may be biased high or low, depending on the test methods used to estimate PM emissions, and the atmospheric conversion of SO₂ to sulfates (or sulfur trioxide, SO₃) may be inaccurate or double-counted. Additionally, some State and local regulatory authorities have assumed that EPA Method 5 of appendix A-3 to 40 CFR part 60 (Determination of Particulate Matter Emissions from Stationary Sources) provides a reasonable estimate of PM₁₀ emissions. This assumption is incorrect because Method 5 does not provide particle sizing of the filterable component and does not quantify particulate caught in the impinger portion of the sampling train. Similar assumptions for measurements of PM_{2.5} will result in greater inaccuracies.

With regard to State permitting programs, we recognize that, in some cases, existing best available control technology, lowest achievable emission rate, or reasonably available control technology limits have been based on an identified control technology, and that the data used to determine the performance of that technology and to establish the limits may have focused on filterable PM and, thus, did not completely characterize PM emissions to the ambient air. While the source test methods used by State programs that developed the applicable permit limit may not have fully characterized the PM emissions, we have no information that would indicate that the test methods are inappropriate indicators of the control technologies' performance for the portion of PM emissions that was addressed by the applicable requirement. As promulgated in the Clean Air Fine Particle Implementation Rule, after January 1, 2011, States are required to consider inclusion of CPM emissions in new or revised emissions limits that they establish. We will defer to the individual State's judgment as to whether, and at what time it is appropriate to revise existing facility emission limits or operating permits to incorporate information from the revised CPM test method when it is promulgated.

With regard to operating permits, the title V permit program does not generally impose new substantive air quality control requirements. In general, after emissions limits are established as CAA requirements under the SIP or a

SIP-approved pre-construction review permit, they are included in the title V permits. Obviously, title V permits should be updated to reflect any revision of existing emission limits or new emission limits created in the context of the underlying applicable requirements. Also, if a permit contains previously promulgated test methods, it is not a given that the permit would always have to be revised should these test method changes be finalized (e.g., where test methods are incorporated into existing permits through incorporation by reference, no permit terms or conditions would necessarily have to change to reflect changes to those test methods). In any event, the need for action related to emissions source permitting, due to these changes to the test methods, would be determined based upon several factors such as the exact wording of the existing operating permit, the requirements of the EPA-approved SIP, and any changes that may need to be made to pre-construction review permits with respect to CPM measurement (e.g., emissions estimates may be based upon a source test method that did not measure CPM or upon a set of Method 202 procedures that underestimated CPM emissions).

In recognition of these issues, the Clean Air Fine Particle Implementation Rule contains provisions establishing a transition period for developing emission limits for condensable direct $PM_{2.5}$ that are needed to demonstrate attainment of the $PM_{2.5}$ NAAQS. The transition period for CPM is the time period during which the new rules and NSR permits issued to stationary sources are not required to address the condensable fraction of the sources' PM emissions. The end date of the transition period (January 1, 2011) was adopted in the final Clean Air Fine Particle Implementation Rule (72 FR 20586, April 25, 2007) and in the final Implementation of the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$) rule (73 FR 28321, May 16, 2008). As discussed in these two rules, the intent of the transition period (which ends January 1, 2011) was to allow time for EPA to issue a CPM test method through notice and comment rulemaking, and for sources and States to collect additional total primary (filterable and condensable) $PM_{2.5}$ emissions data to improve emissions information to the extent possible. In the $PM_{2.5}$ NSR Implementation Rule, we stated that as part of this test methods rulemaking, we would "take comment on an earlier closing date for the transition period in

the NSR program if we are on track to meet our expectation to complete the test method rule much earlier than January 1, 2011" (73 FR 28344). In the notice of proposed rulemaking for this final rule on amendments to Method 201A and 202, EPA sought comment on whether to end the NSR transition period for CPM early (74 FR 12976). In this final rule, EPA is taking no action to affect the already established January 1, 2011 sunset date for the NSR transition period.

Source test data collected with the use of this updated test method will be incorporated into the tools (e.g., emission factors, emission inventories, air quality modeling) used to demonstrate the attainment of air quality standards. Areas that are designated nonattainment for the 1997 $PM_{2.5}$ NAAQS, and that have approved attainment dates of 2014 or 2015, are required to develop a mid-course review in 2011. If it is determined that additional control measures are needed to ensure the area will be on track to attain the standard by the attainment date, any new direct $PM_{2.5}$ emission limits adopted by the State must address the condensable fraction and the filterable fraction of $PM_{2.5}$. Additionally, the new test data could be used to improve the applicability and performance evaluations of various control technologies.

IV. Summary of Final Methods

A. Method 201A

Method 201A measures PM emissions from stationary sources. The amendments to Method 201A add a $PM_{2.5}$ measurement device ($PM_{2.5}$ cyclone) that allows the method to measure filterable $PM_{2.5}$, filterable PM_{10} , or both filterable $PM_{2.5}$ and filterable PM_{10} . The method can also be used to measure coarse particles (i.e., the difference between measured PM_{10} concentration and the measured $PM_{2.5}$ concentration).

The amendments also add a $PM_{2.5}$ cyclone to create a sampling train that includes a total of two cyclones (one cyclone to segregate particles with aerodynamic diameters greater than 10 μm and one cyclone to segregate particles with aerodynamic diameters greater than 2.5 μm) and a final filter to collect particles with aerodynamic diameters less than or equal to 2.5 μm . The $PM_{2.5}$ cyclone is inserted between the PM_{10} cyclone and the filter of the Method 201A sampling train.

The revised method has several limitations. The method cannot be used to measure emissions from stacks that have entrained moisture droplets (e.g.,

from a wet scrubber stack) because size separation of the water droplets is not representative of the dry particle size released into the air. In addition, the method is not applicable for stacks with diameters less than 25.7 inches when the combined $PM_{10}/PM_{2.5}$ cyclone is used. Also, the method may not be suitable for sources with stack gas temperatures exceeding 260 °C (500 °F) when cyclones with screw-together caps are used because the threads of the cyclone components may gall or seize, thus preventing the recovery of the collected PM. However, the method may be used at temperatures up to 1,000 °F when using stainless steel cyclones that are bolted together rather than screwed together. Using "break-away" stainless steel bolts facilitates disassembly and circumvents the problem of thread galling. The method may also be used at temperatures up to 2,500 °F when using specialty high-temperature alloys.

B. Method 202

Method 202 measures concentrations of CPM in stationary source sample gas after the filterable PM has been removed using another test method such as Method 5, 17, or 201A. The CPM sampling train begins at the back half of the filterable PM filter holder and consists of a condenser, two dry impingers (temperatures maintained to less than 30 °C (85 °F)), and a CPM filter (temperature maintained between 20 °C (65 °F) and 30 °C (85 °F)). During the test, sample gases are cooled and CPM is collected in the dry impingers and on the CPM filter. As soon as possible after the post-test leak check has been conducted, any water collected in the dry impingers is purged with nitrogen gas for at least one hour to remove dissolved SO_2 gas.

After the nitrogen purge, the sampling train components downstream of the filterable PM filter (i.e., the probe extension (if any), condenser, impingers, front half of CPM filter holder, and the CPM filter) are rinsed with water to recover the inorganic CPM. The water rinse is followed by an acetone rinse and a hexane rinse to recover the organic CPM. The CPM filter is extracted using water to recover the inorganic components and hexane to recover the organic portion. The inorganic and organic fractions are then dried and the residues weighed. The sum of both fractions represents the total CPM collected by Method 202.

V. Summary of Public Comments and Responses

In response to the March 25, 2009 proposed revisions to EPA Methods 201A and 202, EPA received public

comment letters from industry representatives, trade associations, State agencies, and environmental organizations. The public comments submitted to EPA addressed the proposed revisions to Methods 201A and 202 and our request for comments on whether to end the transition period for CPM in the NSR program on a date earlier than the current end date of January 1, 2011.

This section provides responses to the more significant public comments received on the proposed revisions to Methods 201A and 202. Summaries and responses for all comments related to the proposed revisions to Methods 201A and 202, including those addressed in this preamble, are contained in the response to comments document located in the docket for this final action (Docket ID No. EPA-HQ-OAR-2008-0348).

A. Method 201A

1. Speciation

Comment: One commenter stated that EPA should include guidance in Method 201A concerning speciation of the constituents present in the PM₁₀, PM₁₀-PM_{2.5}, and PM_{2.5} size fractions. The commenter believes this information should be provided to support the use of speciated PM₁₀, PM₁₀-PM_{2.5}, and PM_{2.5} data in source apportionment studies.

Response: EPA did not revise the method to provide guidance for speciation of various particle fractions for source apportionment because Method 201A is not a speciation method. However, with judicious selection of filter media, sources may use this method for speciating the less volatile metals and use these data in source apportionment studies. Including details to adapt this method for speciation analysis would unduly increase the complexity of the method without increasing the precision of the mass measurements.

2. Catch Weight and Sampling Times

Comment: Several commenters requested that EPA specify the minimum solids catch weights needed in the PM₁₀ and PM_{2.5} size fractions to help testing organizations determine the necessary sampling times, especially for sources with low PM concentrations. Other commenters expressed concern about extended sampling times that would be necessary to obtain enough sample to weigh accurately. One commenter stated that a reasonable limit must be put on sampling volume to limit potentially unnecessary sampling time and exorbitant stack testing costs

that could quickly escalate with such a requirement.

Response: We agree with the commenters that collecting sufficient weighable mass is important for the method to be precise. We also understand that the sampling rate used to attain the cyclone cut-points is typically less than the rate used during Method 5 sampling. However, EPA did not revise the method to dictate a minimum sampling volume or minimum catch weight that would be necessary to obtain a valid sample. One reason for not specifying a minimum sampling volume or minimum catch weight is that different regulatory authorities and testing programs have differing measurement goals. For example, some regulatory authorities will accept less precision if results are well below compliance limits. State agencies or individual regulated facilities may develop data quality objectives (DQO) for the test program, which may specify minimum detection limits, and/or minimum sample volume, and/or catch weight that would demonstrate that DQO can be met. Stack samplers should take into consideration the compliance limits set by their regulatory authority and determine the minimum amount of stack gas needed to show compliance if the mass of particulate is below the detection limit.

Stack testers can use the minimum detection limit to determine the minimum stack gas volume. The stack tester may be able to estimate the necessary stack gas volume based on how much PM the source or source category is expected to emit (which could be determined from a previous test or from knowledge of the emissions for that source category).

Alternatively, the minimum detection limit for a source can be determined by calculating the percent relative standard deviation for a series of field train recovery blanks. You will not be able to measure below the average train recovery blank level, and EPA recommends calculating a tester-specific detection limit by multiplying the standard deviation of field recovery train blanks by the appropriate "Student's t value" (e.g., for seven field train recovery blanks, the standard deviation of the results would be multiplied by three). Short of having Method 201A field recovery train blanks for cyclone and filter components of the sampling train, you may use the detection limit determined from EPA field tests.

An estimated detection limit was determined from an EPA field evaluation of proposed Method 201A (see "Field Evaluation of an Improved

Method for Sampling and Analysis of Filterable and Condensable PM," Docket ID No. EPA-HQ-OAR-2008-0348). The estimated detection limit was calculated from the standard deviation of the differences from 10 quadruplicate sampling runs multiplied by the appropriate "Student's t value" ($n - 1 = 9$). Detection limits determined in this manner were (1) Total filterable PM: 2.54 mg; (2) PM₁₀: 1.44 mg; and (3) PM_{2.5}: 1.35. These test runs showed more filterable particulate in the PM_{2.5} fraction, and total filterable particulate detection limits may be biased high due to the small particulate mass collected in the fraction greater than PM₁₀.

Comment: Two commenters questioned the use of reference methods to correct for ambient air in Section 1.5 of the proposed Method 201A. One commenter believed that the statement would be used as a means to blame non-compliance on ambient contributions and would result in legal challenges and disputes of test results. The other commenter questioned whether it was the intent of EPA to not allow the use of the CPM test method for low-temperature sources.

Response: We agree with the commenters that Section 1.5 of the proposed method was unclear. Thus, Section 1.5 (Additional Methods) has been removed from the final method. For sources that have very low PM emissions, such as processes that burn clean fuels (e.g., natural gas) and/or use large volumes of dilution air (e.g., gas turbines and thermal oxidizers), any ambient air particulate introduced into the process operation could be a large component of total outlet PM emissions. However, the decision to correct results for fine PM measurements to account for ambient air contributions is up to the permitting or regulatory authority. It is likely that these adjustments would be limited to gas turbines and possibly sources fired with clean natural gas.

Comment: Commenters expressed concern about the lack of a test method to measure PM_{2.5} in stacks with entrained moisture. Another commenter urged EPA to continue work to identify or develop a method for measuring filterable (or total) PM at sources with entrained moisture droplets in the stack (e.g., units with wet stacks due to wet flue gas desulfurization or wet scrubbers). Commenters requested that EPA provide guidance or identify a viable alternative for high-moisture stacks as soon as possible. One commenter stated that when conducting emission testing at facilities with similar wet stack conditions as described in the proposal preamble (74 FR 12973), that they support EPA's position on the

limitations of the proposed Method 201A.

One commenter was not satisfied with the use of Method 5 as the only acceptable method for sources with entrained water droplets. To provide more accurate emissions data for sources with “wet” stacks, the commenter is sponsoring the development of an advanced manual sampling technique that can accurately measure filterable PM_{2.5} in stacks with entrained water droplets. The commenter expects to complete field tests of this method in the near future. The commenter will share laboratory and field test evaluations of this new method. The commenter believes that this new method for filterable PM_{2.5} emissions in “wet” stacks will be highly compatible with proposed Method 201A for filterable PM_{2.5} emission testing in “dry” stacks.

Response: We are currently developing a method to measure PM in stacks with saturated water vapors and laboratory testing is ongoing. EPA has committed a significant budget and personnel to developing an acceptable method for sources with wet stacks and we plan to offer the method and protocol as soon as possible. EPA’s method development and evaluation is focused on the “Dried Particle Method” (See “Lab Work to Evaluate PM_{2.5} Collection with a Dilution Monitoring Device for Data Gathering for Emission Factor Development (Final Report)” in Docket ID No. EPA-HQ-OAR-2008-0348) that directly measures the mass emission rate of particles with specified aerodynamic size. In the meantime, the promulgated amendments to Methods 201A and 202 improve their performance and reduce known artifacts. Testers should use these final, amended methods until a PM_{2.5} method for stack gases containing water droplets is promulgated.

Regarding the advanced manual sampling technique that the commenter is currently developing for use in “wet” stacks, EPA acknowledges the sampling evaluations being conducted by the commenter. When the data become available, we will review the data to determine if the consistency and performance achieved by the advanced manual sampling technique referenced by the commenter are comparable to EPA’s wet-stack sampling method currently under development. If the data are comparable, we will consider whether the commenter’s sampling technique should be addressed (e.g., as an alternative method) when we propose an EPA wet-stack, particle-sizing method in the future.

Comment: Several commenters disagreed with EPA’s recommendation to use Method 5 on stacks with entrained moisture and to consider all the collected mass to be PM_{2.5}. Commenters stated that the categorization of all PM measured by Method 5 as PM_{2.5} overstates the true emissions. One commenter supported EPA’s recommendation to use Method 5 to determine PM₁₀/PM_{2.5} filterable mass when measuring emissions following a wet scrubber. Another commenter stated that when conducting emissions testing at facilities with similar wet stack conditions, as described in the proposal preamble (74 FR 12973), they supported EPA’s position on the limitations of the proposed Method 201A.

Response: EPA acknowledges that using Method 5 on stacks with entrained moisture and assuming that the catch is PM_{2.5} can potentially overestimate PM_{2.5} concentrations. EPA Method 5 measures total PM mass emissions from stationary sources. Method 5 does not specifically isolate PM₁₀ or PM_{2.5}. Method 17, similar to Method 5, measures total PM mass emissions, but it uses an in-stack filter operating at stack temperature instead of a heated probe and out-of-stack heated filter and thus, is suitable for only dry sources.

Monitoring the emission of PM₁₀ or PM_{2.5} from a wet gas stream is a challenging problem that has not been addressed successfully despite considerable effort. A consensus method to provide this information has not emerged. EPA has determined that particulate from wet stacks is expected to be primarily PM₁₀ under most conditions typical of good wet scrubber design and operation. University of North Carolina particle physicists performed theoretical calculations based on a wet scrubber operating at 10,000 parts per million by weight (ppmw) total dissolved solids (TDS) with water droplets up to 50 µm in size (see “Development of Plans for Monitoring Emissions of PM_{2.5} and PM₁₀ from Stationary Sources With Wet Stacks,” Docket ID No. EPA-HQ-OAR-2008-0348). They determined that water droplets under these conditions, when dried, would generate particles of 10 µm or less. Using the same theoretical basis (i.e., the ratio of TDS to water droplet size), EPA expects that water droplets up to 10 µm in size would generate dried particles of 2 µm or less and that water droplets up to 20 µm would generate dried particles up to 4 µm or less.

Based on wet scrubber operation and typical mist eliminator performance, EPA has determined that the Method 5

filterable particulate measurements are a satisfactory approximation of PM_{2.5} filterable particulate from controlled wet stack emissions. It is the States’ or regulatory authorities’ responsibility to interpret EPA’s recommendation to use Method 5 when measuring PM in stacks containing water droplets and to consider all of the collected material to be PM_{2.5}.

Because a completely acceptable method for measuring PM_{2.5} in wet stacks is not currently available, EPA understands the need to support the States with a PM_{2.5} method for wet stacks. EPA is currently developing this method and laboratory testing is ongoing. EPA has committed a significant budget and personnel to developing an acceptable method for sources with wet stacks, as explained above. In the meantime, the promulgated amendments to Methods 201A and 202 improve their performance and reduce known artifacts. Testers should use these final, amended methods until a PM_{2.5} method for wet stack conditions is promulgated.

Comment: Several commenters expressed concern about the limitation of the method for stack temperatures greater than 500 °F. One commenter asked that EPA investigate a possible modification to the method to utilize sampling equipment that can withstand higher stack temperatures. The commenter also introduced the possibility of moving the particle sizing device, at least for PM_{2.5}, out of the stack and into a heated box, enabling use of a glass-lined probe for sampling. Another commenter stated that the operator of a hot stack should not be required to “take extraordinary measures” (such as using the metal Inconel) when such measures are not defined in the method, no less tested in the field for accuracy. The commenter encouraged EPA to develop an acceptable substitute method for hot stacks. As an alternative, the commenter recommended that Method 5 testing, in conjunction with AP-42 particle size distribution data specific to glass furnaces, should be used for measurement of PM_{2.5} in hot stacks.

Response: EPA investigated additional alternatives to allow the use of screwed together cyclones at elevated stack temperatures. As a result of this investigation, EPA has revised Section 8.6.1 of Method 201A to allow the method to be used at temperatures up to 1,000 °F (538 °C) using stainless steel cyclones that are bolted together, rather than screwed together. Using “break-away” stainless steel bolts facilitates disassembly and circumvents the problem of thread galling. If the

stainless steel bolts seize, over-torquing such bolts causes them to break at the bolt head, thus releasing the cyclones without damaging the cyclone flanges (see "Review of Draft EPA Test Methods 201A and 202 Related to the Use of High Temperature and Out-of-Stack Cyclone Collection," Southern Research Institute, EPA Docket ID No. EPA-HQ-OAR-2008-0348). The method can be used at temperatures up to 2,500 °F using specially constructed high-temperature stainless steel alloys (Hastelloy or Haynes 230) with bolt-together closures using break-away bolts (see also "Development of Particle Size Test Methods for Sampling High Temperature and High Moisture Sources," California Environmental Protection Agency, Air Resources Board Research Division, 1994, NTIS PB95-170221).

Regarding the use of a heated box external to the stack to house the cyclones, EPA disagrees with this approach because of the potential for significant losses of particulate in the nozzle and probe liner. EPA expects that transport losses for particles in the size range of interest would be significant enough to materially affect the measurement results. These losses would be caused by deposition primarily by impaction in the sampling nozzle (at the flow rates used in PM₁₀ and PM_{2.5} sampling) and settling losses in horizontal probes. (See "Review of Draft EPA Test Methods 201A and 202 Related to the Use of High Temperature and Out-of-Stack Cyclone Collection, Southern Research Institute," EPA Docket ID No. EPA-HQ-OAR-2008-0348.)

Sampling from ducts smaller than allowed by the blockage criteria or from ducts at high temperatures presents challenges that should be addressed by the source tester in conjunction with the regulatory authority. Method 201A does not permit the use of a nozzle and probe extension leading to an external heated oven to house the cyclones that would otherwise block stack flow or operate at stack temperatures beyond acceptable limits. Conventional screwed-together cyclones are designed to operate in stacks that have a blockage of less than three percent and have a temperature of less than 500 °F.

Regarding the use of AP-42 as a replacement for PM₁₀ or PM_{2.5} compliance testing, EPA has determined that this is not appropriate because of the uncertainty in the data due to variations in the particle sizing used to generate AP-42 emission factors. EPA's AP-42 particle-sizing data for sources controlled by wet scrubbers are based upon particle sizing methodologies that

are affected by the same influences and uncertainties that make particle sizing in stacks with entrained water droplets a challenging technical issue. Particle-sizing information in AP-42 is based primarily upon data collected in the 1970s and early 1980s. The uncertainties associated with methods used during this period of time result in particle-sizing data that are dated and may not reflect the best sampling technology or the emissions from current control devices. Particle-sizing data from the 1970s employed many measurement methodologies that were found to introduce indeterminate biases in the particle sizing data. Also, source testers implemented measurement methods in different ways to deal with particle-sizing methodology and source-specific measurement challenges. The inconsistencies associated with addressing measurement challenges and indeterminate biases led to higher uncertainties associated with the measurement method results. Therefore, AP-42 should not be used as a replacement for contemporary emissions testing.

However, it may be acceptable to allow limited application of AP-42 particle size distributions as screening assessments when the underlying biases, uncertainties, and variations of the particle-sizing are taken into consideration. For example, one simple method involves using terms that include factors (such as the TDS of the recirculating scrubber water, estimated water droplet size distribution of the exit gas, and total liquid mass) that are already used to calculate approximate emission factors. Instruments are commercially available that can continuously monitor TDS and water flow rate, and the output from these instruments could feed into an emission factor to provide a continuous estimate of emissions that varies with process conditions. However, work needs to be done to evaluate the reliability and bias of this type of candidate estimation method. The required data inputs for this type of estimation model need to be identified and the likelihood that these inputs can be provided by the emission source needs to be confirmed. Once the input data can be readily obtained, the estimation model(s) needs to be evaluated to bring the most promising methods to fruition. (See "Development of Plans for Monitoring Emissions of PM_{2.5} and PM₁₀ from Stationary Sources with Wet Stacks, Department of Environmental Sciences and Engineering, University of North Carolina at Chapel Hill under subcontract to MACTEC Federal

Programs," EPA Contact No: EP-D-05-096, Work Assignment 2-05, August 2007; Docket ID No. EPA-HQ-OAR-2008-0348).

Comment: Several commenters requested changes to Section 6 of Method 201A regarding equipment and supplies. One commenter questioned the use of glass dishes and glass 250 ml beakers for drying the filter and rinses in proposed Method 201A. Another commenter stated that, at a minimum, the method should specify glass beakers, 50 ml weighing tins, and an analytical balance with a resolution of 0.00001 g (0.01 mg). One commenter recommended that polyethylene transfer/storage bottles should be allowed to minimize the chance of breakage when in the field.

Response: We revised Sections 6.2, 11.2.4, and 11.2.7 of Method 201A to allow the use of fluoropolymer beaker liners for evaporating the particulate rinse solvent and the acetone field reagent blank, desiccating particulate to constant weight, and weighing particulate samples in the final evaporation step. We revised Section 6.2, consistent with the commenter's suggestions, and added glass beakers and an analytical balance with a resolution of 0.00001 g (0.01 mg) to the sample recovery and analytical equipment list. However, we did not include weighing tins because we determined that quantitative transfer of particles in acetone from a beaker to a weighing tin is not necessary and adds unnecessary imprecision to the final sample weight. Alternatively, EPA has changed the method to allow fluoropolymer beaker liners to be used to evaporate and weigh the samples.

EPA revised Section 6.2.1 of Method 201A by defining sample recovery items consistently with Method 5, except for wash bottles and sample storage bottles. Any container material is acceptable for wash bottles and storage bottles, but the container must not contribute more than 0.05 mg of residual mass to the CPM measurements.

Comment: Several commenters expressed concern about the proposed requirement to use a 6-inch sampling port. One commenter pointed out that using a 6-inch sampling port would be required only for the combined PM₁₀/PM_{2.5} sampling apparatus. Another commenter stated that the physical dimensions of the cyclone would also cause problems with installation in the generally small fryer and dryer stacks. Another commenter noted that the partitioning of the filterable solids using bulky, in-stack cyclones creates several logistical and practical problems. The commenter

stated that the size of the in-stack separation cyclones requires 6-inch to 8-inch sampling ports that do not exist at the vast majority of stationary sources potentially affected by this final action.

Response: EPA understands the commenters' concerns regarding sampling port diameter requirements. However, facilities that are required to use Method 201A are responsible for ensuring that the stack has the appropriately sized sampling ports. The need for the larger port diameter has not changed from the requirement as stated in the 1990 version of this method. We revised Section 8.3.1 of Method 201A to more clearly describe when a 4-inch port may not accommodate the PM₁₀ particle-sizing cyclone and the nozzle that extends from the cyclone and to highlight the need for a larger port in such situations.

Comment: One commenter requested that EPA adjust the allowable number of traverse points that fall outside of the range of the Δp_{\min} and Δp_{\max} for cases in which more than the recommended maximum 12 traverse points are sampled by Method 201A. Many agencies require that more than the recommended maximum 12 traverse points be sampled if total filterable particulate is being determined. The commenter requested that the number of allowed out-of-range values be adjusted to match the stated failure rates expressed as percentages.

Response: EPA agrees that increasing the number of allowable traverse points outside the range Δp_{\min} and Δp_{\max} is appropriate when more than the recommended number of traverse points are sampled. EPA has modified Section 8.5.5 of the method to allow 16 percent failure rate rounded to the nearest whole number for PM_{2.5} only and 8 percent failure rate rounded to the nearest whole number if the coarse fraction for PM₁₀ determination is included.

Comment: One commenter requested that EPA add a new section in Section 8.3.2 to address ducts with diameters less than 18 inches. The commenter stated that the new section should state that ducts with diameters less than 18 inches have blockage effects ranging from five to ten percent. Therefore, according to the commenter, when a test is conducted on these small ducts, the observed velocity pressures must be adjusted for the estimated blockage factor whenever the combined sampling apparatus blocks more than three percent of the stack or duct.

For stacks smaller than 18 inches, one commenter asked if there would still be a blockage issue even when following

the proposed Method 201A procedures, especially as the stack diameter gets smaller. The commenter also asked if there was a lower limit of stack diameter where the method cannot be used.

One commenter stated that when conducting emissions testing at facilities with similar small stack (less than 18 inches in diameter) conditions, as described in the proposal preamble (74 FR 12973), their experience supported EPA's position on the limitations of the proposed Method 201A. Another commenter pointed out an error in Section 8.7.2.3 that implied that the method could be used on stacks with diameters less than 18 inches.

Another commenter requested that if testing of stacks less than 18 inches in diameter is still allowed and the testers are required to use Method 1A, then the option of using a standard pitot tube should apply.

Response: We revised Section 8.7.2.3 of Method 201A to clarify the lower limits of stack diameter for different sampling configurations. The combined PM₁₀/PM_{2.5} filter sampling head and pitot tube is not applicable for stacks with a diameter less than 26.5 inches because the blockage is greater than six percent. Blockage above six percent is not allowed for the combined PM₁₀/PM_{2.5} filter sampling head and pitot tube. However, measurements for only PM_{2.5} may be possible using only a PM_{2.5} cyclone, pitot tube, and in-stack filter for stacks with a diameter less than 26.5 inches. If the blockage exceeds three percent but is less than six percent in that configuration, you must follow the procedures outlined in Method 1A to conduct tests on stacks less than 26.5 inches in diameter. In addition, you must conduct the velocity traverse downstream of the sampling location or immediately before the test run.

We also modified Section 10.1 of the method to allow standard pitot tubes to be used downstream when significant blockage exists. As stated in Section 8.3.2.2, you must adjust the observed velocity pressures for the estimated blockage factor whenever the sampling apparatus blocks three to six percent of the stack or duct.

Comment: One commenter requested that the specification for the maximum allowable acetone blank value be changed from 0.001 percent by weight to either 1 ppmw or 0.0001 percent by weight to be consistent with the reagent specification stated in Section 7.2.1 of the method.

Response: We agree with the commenter that maximum allowable acetone blank value should be consistent with the reagent specification stated in Section 7.2.1. Thus, we revised

Section 12.3.2.3 of the final method to specify the maximum allowable acetone blank in terms of weight per volume of acetone (0.1 mg per 100 ml solvent), rather than percent weight.

Comment: One commenter expressed concern about the approach in Section 12.3.2.3 of the proposed method. The commenter stated that subtracting the acetone blank mass from the individual sample masses would be acceptable if the volumes of the acetone rinses are all exactly 100 ml. However, according to the commenter, this was not reality, and the accuracy of determining the blank correction suffers from this approach. The commenter suggested that rather than subtracting the mass of the acetone rinse blank dry residue directly from the sample masses, the concentration of the acetone rinse blank should be calculated as the mg of dry residue per ml of acetone rinse blank volume limited to the concentration of residue at 1 ppmw. The commenter stated that this concentration of the dry residue would be multiplied by the volume of the acetone in ml used to collect and recover each sample from the sampling head. The commenter stated that the resulting mass would be subtracted from the dry residue mass determined for the sample of interest. According to the commenter, this approach will provide a more accurate determination of the dry residue mass from the acetone rinse blank due to processing a larger volume of acetone, and assessment of the blank mass correction for each sample as it will be proportional to the amount of acetone used to collect each sample. The commenter stated that the liquid volume of the samples and blanks could be determined by either direct volumetric measurement or by multiplying the wet weight of the sample or blank by the density of the reagent at 20 °C.

Response: We agree with the commenter and with the commenter's suggested equation. Therefore, we revised Section 12.3.2.3 of the final method to accommodate different acetone rinse volumes. However, the correction must be proportional to the amount of solvent used. Some testers may use more solvent due to heavy deposits that are difficult to remove, while other testers may use less solvent. Therefore, the maximum adjustment is 0.1 mg per 100 ml of the acetone used from the sample recovery.

B. Method 202

1. Extraction Solvent

Comment: Three commenters noted that methylene chloride is highly toxic. One commenter stated the use of

methylene chloride poses significant exposure risks to field test personnel, plant personnel working in the area of the mobile laboratory, and agency test observers. Two commenters stated that Method 202 should specify a less toxic solvent than methylene chloride, such as n-hexane.

One commenter stated that EPA should sponsor a set of tests to confirm that n-hexane or another less-toxic solvent provides the sample rinse effectiveness as methylene chloride. Another commenter encouraged EPA to conduct future studies to identify a solvent to replace methylene chloride in Proposed Method 202 and in other EPA reference methods.

Another commenter stated that the use of methylene chloride (a known carcinogen) as the cleaning and recovery solvent will require safety departments to develop procedures for appropriate handling on-site and the use of personal protection equipment for personnel that may be exposed to the solvent. The commenter noted that toluene, which is used in EPA Method 23, is a technically acceptable alternative to methylene chloride. The commenter suggested that EPA review the use of toluene as a replacement for methylene chloride in Method 202 (and OTM 028).

Response: The extraction solvent specified in a particular test method is dependent on the analyte(s) of interest. If the target analyte is known, an appropriate solvent can be identified that has the desired recovery performance for that analyte. For Method 202, the pollutant measured by the method, CPM, is defined by the method (i.e., whatever remains after the sample recovery procedures is considered to be CPM regardless of its analyte group). Although no single solvent is universally applicable to all analyte groups, methylene chloride was chosen for the proposed method based upon studies ("IERL-RTP Procedures Manual, Level 1, Environmental Assessment"; EPA-600/2-76-160a; June 1976) that showed it was the optimum solvent to recover polar and non-polar CPM.

We acknowledge the commenters' concerns regarding the toxicity of methylene chloride and the exposure hazards associated with its use, and we agree that the use of an alternative solvent is justified. However, because the recovery performance of solvents has been previously evaluated to support various EPA programs, we disagree with the commenters that additional studies are necessary to identify a suitable alternative solvent.

In identifying an alternative solvent, we initially considered specifying

toluene because its extraction performance for non-polar compounds is similar to methylene chloride. However, because the vapor pressure of toluene is lower than methylene chloride, additional time would be needed to evaporate the organic samples to dryness at room temperature (30°C or less). Because the additional evaporation time would be an additional burden on testing contractors and present the risk of losing condensable organic compounds, we rejected toluene as the replacement solvent.

We also evaluated the solvents used for organic compound recovery in the analytical methods developed by EPA's Office of Solid Waste (http://www.epa.gov/epawaste/hazard/testmethods/sw846/online/3_series.htm). We reviewed EPA's "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (SW-846), which was developed to support the Resource Conservation and Recovery Act (RCRA) program, to identify test methods that covered the same types of compounds expected to comprise CPM. Based upon our review of SW-846, we identified Method M-3550c (Ultrasonic Extraction) as a comparable method (M-3550c is used to extract semi-volatile organic compounds from waste samples). Section 7.4 of M-3550c, which discusses extraction solvents, lists the following extraction solvents by class of compound:

- Acetone/hexane or acetone/methylene chloride can be used to extract semivolatile organics.
- Acetone/hexane or acetone/methylene chloride can be used to extract organochlorine pesticides.
- Acetone/hexane, acetone/methylene chloride, or hexane can be used to extract polychlorinated biphenyls (PCB).

Of the above compound classes, the class that most closely relates to the type of high-molecular weight hydrocarbons expected to comprise organic CPM is PCB. Hexane is also listed as an alternative solvent (when used in combination with acetone) for the other compounds classes discussed in Section 7.4. Consequently, based upon this analysis, we have replaced methylene chloride with hexane in the final method.

2. Sample and Blank Containers

Comment: One commenter recommended that EPA revise the proposed method to specify the container type for each container (i.e., glass or plastic), and also whether the lid should have a Teflon® liner or whether another liner is acceptable.

Response: We disagree with the commenter that the method should specify the material of construction of containers used for sample and blank recovery procedures. Although we believe that the most appropriate containers are constructed of glass and equipped with a fluoropolymer lid, we also believe that testing contractors should have the flexibility to select the type of containers that meet the performance specifications of the method. Therefore, we have revised the proposed method to add a performance-based specification for containers. Section 6.2.2 of the final method specifies that the containers used for sample and blank recovery procedures must not contribute more than 0.05 mg of residual mass to the CPM measurements.

Accompanying edits were also made to the CPM container language in Section 8.5.4 (Sample Recovery).

3. CPM Filter

Comment: One commenter suggested that the language in Section 7.1.1 of the proposed method be revised to replace the term "Filter" with "CPM Filter" and replace "Teflon®" with "Teflon®, fluoropolymer or chemically equivalent." Another commenter stated that the final method should allow for alternatives to Teflon® filters, such as quartz, polytetrafluoropolymer (PTFE) coated, or PTFE filters.

Response: Based upon the comments received regarding the CPM filter, we revised the language in Section 7.1.1 to include performance-based specifications for the CPM filter rather than specifying a particular type of filter. Section 7.1.1 of the final method specifies that the CPM filter must be a non-reactive, non-disintegrating filter that does not contribute more than 0.5 mg of residual mass to the CPM measurements. The CPM filter must have an efficiency of at least 99.95 percent (less than 0.05 percent penetration) on 0.3 µm particles. Documentation of the CPM filter's efficiency is based upon test data from the supplier's quality control program.

In selecting the appropriate CPM filter, testing contractors should avoid the mistake of equating the dioctyl phthalate size for the test particles to the pore size for the filter. Filters with pore sizes larger than the test particles can retain a high percentage of very small particles. In our evaluation of different types of filters, we determined that filter sizes of 47 mm are marginal, if not unacceptable, for use. Additionally, we believe that hydrophobic filters should be used to avoid absorption of water onto the CPM filter.

4. Water Specifications

Comment: Two commenters suggested that the final method specify the level of residue allowed for the water used to clean glassware and recovery samples, as was specified for acetone and methylene chloride. One commenter stated that the maximum percent residue by weight of the water should be specified to be consistent with the reagent specifications for acetone and methylene chloride. Three commenters noted that a residual mass level is not available for ASTM International D1193-06, Type I water.

Response: The purpose of the field reagent blanks is to provide a testing contractor with information to target corrective actions, if necessary, if they have difficulty in meeting the residual mass allowance in the method. The method does not require analysis of field reagent blank samples, and the field reagent blank values are not used in correcting CPM measurements. However, we acknowledge that Figure 3 could be misleading with regard to the field reagent blanks, and we have revised Figure 3 of the final method to remove the entries for the field reagents.

We acknowledge that the residue level is not specified for ASTM International D1193-06, Type I water, and we agree with the commenters that the method should specify a residual mass level for water used to prepare glassware and recover samples. Therefore, we have revised Sections 7.1.3 and 7.2.3 of the final method to specify that glassware preparation and sampling recovery must be conducted using deionized, ultra-filtered water that meets a residual blank value of 1 ppmw or less. We have also made accompanying changes to water specified in Sections 8.4, 8.5.3.2, and 11.2.2.1 of the final method. We believe that this performance specification will provide flexibility to testing contractors in obtaining deionized, ultra-filtered water (e.g., water could be purchased with a vendor guarantee or the contractor could evaluate water they produce by evaporation and weighing of the residue).

5. Glassware Baking Requirements

Comment: Several commenters stated that the proposed requirement in Section 8.4 to bake glassware at 300 °C for six hours was excessive. Several commenters stated that they had conducted experimental tests that showed that a lower baking temperature (e.g., 125 °C for three hours) was sufficient to achieve the blank allowance specified in the method. One commenter stated that, based upon their

experiments, no benefit was obtained from baking glassware. Another commenter stated that they had conducted numerous test runs on non-combustion sources without baking glassware and had achieved acceptable blank results. The commenter noted that there might be some emission sources where baking of glassware could be needed to meet the blank requirements, but the commenter stated that the mandatory baking requirements did not seem to be necessary for all sources. Another commenter stated that there is no laboratory data to determine if a lower temperature could be sufficient to achieve low background masses. Based upon experimental results, the commenter suggested allowing the use of baking of glassware at 125 °C for three hours.

One commenter stated that, because the presence of silicone grease on impinger surfaces is highly unlikely due to the prevalence of O-rings, baking the glassware at 125 °C for three hours after cleaning is adequate. The commenter added that the baking requirements should be revised because high-temperature baking would destroy or deteriorate the O-rings typically used to seal impinger components. The commenter stated that the effort to remove these O-rings before baking and then replace them after baking is time-consuming. Several commenters noted that the high-temperature baking requirements would be overly expensive (e.g., for large, high-temperature ovens) and time-consuming.

Another commenter stated that the requirement for glassware baking only prior to the test makes little sense. The commenter questioned why the glassware could not be rinsed with the recovery solvents as is done between runs. The commenter noted that the proposed method mandates a reagent blank and questioned why the reagent blank could not be changed to a proof blank with a limit.

One commenter stated that the requirement to bake glassware at 300 °C for six hours should be optional because it has not been possible to fully evaluate the supporting data and the need for such high temperature is not readily apparent for all situations. The commenter noted that the "Draft Project Report—Evaluation and Improvement of Condensable Particulate Measurement" may contain this information and recommended that the effect of pre-bake temperature and time on cleanliness of blanks be clearly presented in this report and include a table comparing the effect of 300 °C for six hours versus lower glassware preparation temperatures. Otherwise, according to

the commenter, this requirement would require the stack tester to bring to the testing site a large amount of pre-cleaned glassware, much more than what is currently normal for such testing.

One commenter suggested that testing contractors be allowed to meet the blank level specified in the method however they can. The commenter stated that the prescriptive temperature requirement, particularly in light of the fact that there are no data showing that the 2 mg blank cannot be achieved at lower temperatures or through other means, did not serve a purpose. Another commenter recommended that the tester start with baked glassware for the first test and then be allowed to perform additional tests reusing the same glassware after it has been cleaned by chemical methods. If the chemical cleaning of the glassware is not adequate, the commenter noted that blank values would likely elevate, possibly eliminating the test from consideration. If the blanks do not elevate, the commenter stated that this scenario would be very cost-effective and would conserve resources.

Response: Method 202 has the potential to measure CPM at very low levels. Consequently, the glassware used in the sampling train must be free from contamination to maximize the precision and accuracy of the CPM measurements. The glassware cleaning requirements contained in the proposed revisions to Method 202 were based upon experimental results that indicated that the allowable blank correction of the method could not be achieved without thorough cleaning and baking of the glassware at 300 °C for six hours.

Based upon our review of the public comments received regarding the baking requirements, we have determined that it is appropriate to provide a performance-based option in Section 8.4 for demonstrating the cleanliness of glassware used during the emission test. The option provides testing contractors with flexibility when preparing glassware while maintaining the cleanliness requirements of the method.

As an alternative to baking glassware, the final method allows testing contractors to perform a proof blank of the sampling train. Field train proof blanks are recovered on-site from a clean, fully assembled sampling train prior to the first emissions test and provide the best indication of the lowest residual mass achievable by the tester. Field train recovery blanks are recovered from a sampling train after it has been used to collect emissions samples and has been rinsed in

preparation for the second or third test in a series at a particular source. Use of field train recovery blanks allows the tester to account for and manage additional uncertainty that may be attributed to the tester's ability to clean the sampling train between test runs in the field.

6. Nitrogen Purge

Comment: Three commenters requested that the nitrogen purge procedures specified in Section 8.5 of the proposed method be revised to allow for the dry gas meter to be disconnected from the sampling train before the nitrogen purge is conducted. Two commenters stated that EPA should eliminate the portion of Figure 2 that shows the meter box and revise the text in the proposed Method 202 to require purging in a clean environment without the need for a meter box. Three commenters added that allowing the dry gas meter to be disconnected from the sampling train would decrease the delay between tests (*i.e.*, the dry gas meter could be used with a new sampling train while the purge is being conducted on the previous train). Three commenters also stated that requiring the dry gas meter to be connected to the sampling train during the purge will force testing contractors to bring extra equipment (*e.g.*, sampling trains, dry gas meters) to the sampling site.

Three commenters suggested that the purge should be conducted at the sample recovery location (*e.g.*, mobile laboratory) rather than at the actual sampling location (*e.g.*, roof, stack sampling platform). Two commenters noted that it is not practical to haul nitrogen cylinders to the sampling location. One commenter suggested that, after the final leak check, the open ends of the impinger train could be capped during transport to the sample recovery area to reduce the possibility of oxygen contamination. The commenter noted that the sample would not be exposed to any more air than when immediately connecting to the nitrogen purge line.

Several commenters suggested that the proposed method be revised to allow testing contractors to conduct a positive-pressure purge instead of a negative-pressure purge using the dry gas meter. One commenter suggested that the purge gas flow rate be monitored by a rotameter instead of using the dry gas meter. The commenter noted that the flow rate is better regulated upstream of the impingers rather than downstream by the dry gas meter and using the rotameter to regulate the purge gas flow rate would reduce the potential for pressurizing the

sampling train. Another commenter expressed concerns that if the vacuum drawn by the dry gas meter does not match the pressure from the nitrogen tank, then the impingers could become over-pressurized which could compromise the integrity of the sampling train components.

One commenter recommended that the proposed testing protocol be modified to allow the tester to disassemble the impinger train to measure for moisture content prior to conducting the required nitrogen purge. One commenter noted that weighing the impingers prior to the nitrogen purge would provide a more accurate moisture catch determination and the need to measure the amount of degassed deionized water that is added (if any) would be eliminated. Three commenters added that, if the moisture content of the impingers is determined before the nitrogen purge, then testing contractors should be allowed to purge only the knock-out impinger, backup impinger, CPM filter, and first moisture trap impinger. One commenter stated that if the sampling train is purged by pushing nitrogen through the sampling train (*i.e.*, positive pressure purge), then the sampling train components after the CPM filter thermocouple could be disconnected from the train before beginning the purge. One commenter suggested that the purge be conducted through a Teflon® tube inserted through a stopper into the impinger arm and then into the liquid to avoid compounding errors associated with adding water to the first impinger (if needed). The commenter stated that this would alleviate the need to break the fitting or add water, and prevent the potentially compounding error of water addition. Another commenter requested that a Teflon® line be inserted down and through the short-stem impinger extending below the water level in the impinger catch. The commenter stated that this would reduce the potential for breaking glassware and contamination when removing/inserting glassware stems.

Three commenters suggested that the nitrogen purge requirements be revised to allow for any liquid collected in the first (drop-out) impinger to be transferred to the second (backup) impinger. The commenters noted that this approach would decrease the potential for contamination because a new piece of glassware (the long-stem impinger) would not be introduced into the sampling train. One commenter recommended that, after the liquid is transferred to the second impinger, the first impinger should be removed from the sampling train prior to the purge.

Response: It was our intent in the proposed Method 202 to allow testing contractors the option of conducting either a pressurized purge (*i.e.*, without the dry gas meter box and pump attached to the sampling train) or a vacuum purge (*i.e.*, with the dry gas meter box attached to the sampling train). However, we acknowledge that the language in Section 8.5.3 and the sampling train depicted in Figure 2 of the proposed method were unclear. Consequently, we have revised Section 8.5.3 and Figure 2 and added Figure 3 to the final method to clarify that a pressurized purge is an acceptable alternative.

With regard to the commenters' suggestion to allow testing contractors to conduct the nitrogen purge at the sample recovery location instead of at the sampling location, we continue to believe that testing contractors should have the flexibility to conduct the nitrogen purge at the location of their choosing; therefore, the final method does not specify where the purge must be conducted. However, testing contractors should conduct the purge as soon as practicable after the post-test leak check to reduce the potential for artifact formation in the impinger water.

With regard to the alternative sampling train configuration for the purge, we agree with the commenters that testing contractors should be allowed the option of determining the amount of moisture collected prior to conducting the nitrogen purge, transferring any water collected prior to the CPM filter to the second impinger, and performing the nitrogen purge on the second impinger and the CPM filter only. Therefore, Section 8.5.3.2 of the final method contains an alternative purge procedure.

We disagree with the commenter's suggestion to insert a Teflon® tube into the first impinger for conducting the nitrogen purge. Using the configuration suggested by the commenters, there is no provision to maintain the temperature of the purge gas. Consequently, we believe that a Teflon® or other inert line used to purge the CPM train is not an acceptable alternative. Therefore, we are not revising Section 8.5.3.2 to allow the use of a Teflon® tube.

C. Conditional Test Method 039 (Dilution Method)

Comment: Several commenters urged EPA to continue the development of dilution-based test methods for measuring PM_{2.5}. One commenter supported EPA's work through the stakeholder process to decrease and eliminate other pollutant interferences

that can affect the accurate measurement of emissions of fine particles, particularly for wet stacks and high volume/low concentration gas streams. Another commenter encouraged EPA to use the stakeholder process, similar to that used for Methods 201A and 202, to move towards the promulgation of dilution methods and other test methods that can better measure emissions from high-temperature and high-moisture sources.

One commenter asserted that dilution methods more correctly simulate the atmospheric process leading to the formation and deposition of PM in the atmosphere. Another commenter expected that EPA's evaluation of an air dilution method would show that it is even more useful in accurately measuring direct PM_{2.5} filterable and condensable data for high temperature sources than the revised Methods 201A and 202.

Response: EPA continues to evaluate the precision and bias of PM_{2.5} collected using dilution methods. In addition to EPA's hardware design, several other hardware designs have been proposed that utilize dilution. While limited evaluations of EPA's hardware design have been performed, the other hardware designs proposed have more limited evaluations. The consensus standards body, ASTM International, has embarked on preparation of a standard method for dilution sampling of particulate material. We will continue to evaluate dilution method procedures and support the efforts of the ASTM International in their development of a standard dilution-based test method for sampling PM. In addition to these development efforts, several other factors influence EPA's decision to delay proposing a dilution based sampling method. One factor is that there is no widely accepted dilution method available at this time. Another factor is that the available dilution sampling hardware configurations share few of the equipment used by any of the existing sampling methods. As a result, testing contractors would be required to invest in this new equipment. This capital investment would require a higher charge for testing than for the existing methods. In addition, since dilution sampling is somewhat more complex, contractors are likely to initially charge a premium for this more complex testing. Lastly, the availability of hardware and experienced individuals to perform dilution sampling is extremely limited. EPA recognizes that there are limited applications where dilution sampling provides advantages over the standard test methods. As a result, we encourage

sources that encounter these situations to request that the regulatory authority that established the requirement to use this method to approve the use of dilution sampling as an alternative to the test method specified for determining compliance.

Comment: One commenter maintained that use of a test method to define what constitutes CPM for all sources is neither necessary, nor (in some cases) useful. For sources, like coal-fired boilers, where the only true condensable sulfate specie from coal combustion is sulfuric acid, the commenter stated that CPM could be better quantified by direct measurement using the Controlled Condensation Method (CCM). The commenter said that States should be allowed and, in the case of units with wet scrubbers, encouraged to use such direct measurements like CCM to quantify known CPM instead of using Method 202. According to the commenter, if the use of CCM is not allowed, Method 202 should include a procedure that allows sources to correct Method 202 results using results from simultaneous CCM test runs. In this procedure, according to the commenter, the source would be subtracting out essentially the same units of sulfate from Method 202 as would be added back in from the CCM results. If, on the other hand, sulfate artifacts do exist, the commenter said that the source would be subtracting "x" units of sulfate from Method 202 and adding back "y" units of sulfate from CCM to get an accurate measurement.

Response: While SO₃ may be the most abundant CPM emitted from coal fired combustion, there is indication that other compounds comprise CPM. Few speciation tests of coal and oil combustion have been performed, but those that have indicate the presence of not only sulfate but also chloride, nitrate, ammonium ion, and a range of inorganic elements that are potentially components for CPM (including phosphorous, arsenic, and selenium). In addition, speciation tests have been able to identify components representing only about 60 percent of the mass. Therefore, the specific correction for sulfuric acid from coal combustion source emissions proposed by the commenter would add to the complexity of the method for all source categories while providing an advantage to only one specific source category.

EPA continues to review methods that involve controlled condensation for sulfuric acid. Because no standard method is available for controlled condensate measurement of sulfuric acid, we have determined that providing additional guidance or correction of

Method 202 results is premature. EPA is following current efforts by ASTM International to develop a standard controlled condensate method for sulfuric acid. In the meantime, testers and facilities should petition their regulatory authority to approve alternative data treatment for specific sources.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a "significant regulatory action" under the terms of Executive Order (EO) 12866 (58 FR 51735, October 4, 1993) and is, therefore, not subject to review under the EO.

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b). The final amendments do not contain any reporting or recordkeeping requirements. The final amendments revise two existing source test methods to allow one method to perform additional particle sizing at 2.5 µm and to improve the precision and accuracy of the other test method.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on

a substantial number of small entities. This final rule will not impose any requirements on small entities. Most of the emission sources that will be required by State regulatory agencies (and federal regulators after 2011) to conduct tests using the revised methods are those that have PM emissions of 100 tons per year or more. EPA expects that few, if any, of these emission sources will be small entities.

Although this final action will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this final action on small entities. This final rule does not require any entities to use these final test methods. Such a requirement would be mandated by a separate independent regulatory action. However, upon promulgation of this final action, some entities may be required to use these test methods as a result of existing permits or regulations. Since the cost to use the final test methods is comparable to the cost of the methods they replace, little or no significant economic impact to small entities will accompany the increased precision and accuracy of the final test methods. After January 1, 2011, when the transition period established in the Clean Air Fine Particle Implementation Rule expires, States are required to consider inclusion of pollutants measured by these test methods in new or revised regulations. The economic impacts caused by any new or revised State regulations for fine PM would be associated with those State rules and not with this final action to modify the existing test methods. Consequently, we believe that this final action imposes little if any adverse economic impact to small entities.

D. Unfunded Mandates Reform Act

This rule contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, and tribal governments or the private sector. The incremental costs associated with conducting the revised test methods (expected to be less than \$1,000 per test) do not impose a significant burden on sources. Thus, this final action is not subject to the requirements of sections 202 and 205 of the UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. The low incremental cost associated with the revised test methods mitigates any significant or unique effects on small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. In cases where a source of PM_{2.5} emissions is owned by a State or local government, those governments may incur minimal compliance costs associated with conducting tests to quantify PM_{2.5} emissions using the revised methods when they are promulgated. However, such tests would be conducted at the discretion of the State or local government and the compliance costs are not expected to impose a significant burden on those governments. Additionally, the decision to review or modify existing operating permits to reflect the CPM measurement capabilities of the final test methods is at the discretion of State and local governments and any effects or costs arising from such actions are not required by this rule. Thus, Executive Order 13132 does not apply to this action.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In cases where a source of PM_{2.5} emissions is owned by a tribal government, those governments may incur minimal compliance costs associated with conducting tests to quantify PM_{2.5} emissions using the revised methods when they are promulgated. However, such tests would be conducted at the discretion of the tribal government and the compliance costs are not expected to impose a significant burden on those governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard

intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action involves technical standards. EPA has decided to use two voluntary consensus standards that were identified at proposal to be applicable for use within the amended test methods. The first voluntary consensus standard cited in proposed Method 202 was ASTM International Method D2986–95a (1999), “Standard Method for Evaluation of Air, Assay Media by the Monodisperse DOP (Diocetyl Phthalate) Smoke Test,” for its procedures to conduct filter efficiency tests. In the final Method 202, we replaced the prescriptive requirement to use a filter meeting ASTM International D2986–95a (1999) with a performance-based requirement limiting the residual mass contribution. The performance based approach specifies that the CPM filter must be a non-reactive, non-disintegrating filter that does not contribute more than 0.5 mg of residual mass to the CPM measurements. Regarding efficiency, the CPM filter must have an efficiency of at least 99.95 percent (< 0.05 percent penetration) on 0.3 µm particles.

The second voluntary consensus standard cited in proposed Method 202 was ASTM International D1193–06, “Standard Specification for Reagent Water,” for the proper selection of distilled ultra-filtered water. In response to public comments, we applied a

performance-based approach in the final Method 202 that requires deionized, ultra-filtered water that contains 1.0 ppmw (1 mg/L) residual mass or less.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The final amendments revise existing test methods to improve the accuracies of the measurements that are expected to improve environmental quality and reduce health risks for areas that may be designated as nonattainment.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefore, and established an effective date of January 1, 2011 (see section I.C, *supra*). EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of

Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 51

Administrative practice and procedure, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen oxide, Ozone, PM, Reporting and recordkeeping requirements, Sulfur compounds, Volatile organic compounds.

Dated: December 1, 2010.

Lisa P. Jackson,
Administrator.

■ For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51—[AMENDED]

■ 1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C 7401–7671q.

■ 2. Amend appendix M by revising Methods 201A and 202 to read as follows:

Appendix M to Part 51—Recommended Test Methods for State Implementation Plans

* * * * *

METHOD 201A—DETERMINATION OF PM₁₀ AND PM_{2.5} EMISSIONS FROM STATIONARY SOURCES (Constant Sampling Rate Procedure)

1.0 Scope and Applicability

1.1 Scope. The U.S. Environmental Protection Agency (U.S. EPA or “we”) developed this method to describe the procedures that the stack tester (“you”) must follow to measure filterable particulate matter (PM) emissions equal to or less than a nominal aerodynamic diameter of 10 micrometers (PM₁₀) and 2.5 micrometers (PM_{2.5}). This method can be used to measure coarse particles (i.e., the difference between the measured PM₁₀ concentration and the measured PM_{2.5} concentration).

1.2 Applicability. This method addresses the equipment, preparation, and analysis necessary to measure filterable PM. You can use this method to measure filterable PM from stationary sources only. Filterable PM is collected in stack with this method (i.e., the method measures materials that are solid or liquid at stack conditions). If the gas filtration temperature exceeds 30 °C (85 °F), then you may use the procedures in this method to measure only filterable PM (material that does not pass through a filter or a cyclone/filter combination). If the gas filtration temperature exceeds 30 °C (85 °F), and you must measure both the filterable and condensable (material that condenses after passing through a filter) components of total primary (direct) PM emissions to the

atmosphere, then you must combine the procedures in this method with the procedures in Method 202 of appendix M to this part for measuring condensable PM. However, if the gas filtration temperature never exceeds 30 °C (85 °F), then use of Method 202 of appendix M to this part is not required to measure total primary PM.

1.3 Responsibility. You are responsible for obtaining the equipment and supplies you will need to use this method. You must also develop your own procedures for following this method and any additional procedures to ensure accurate sampling and analytical measurements.

1.4 Additional Methods. To obtain results, you must have a thorough knowledge of the following test methods found in appendices A–1 through A–3 of 40 CFR part 60:

(a) Method 1—Sample and velocity traverses for stationary sources.

(b) Method 2—Determination of stack gas velocity and volumetric flow rate (Type S pitot tube).

(c) Method 3—Gas analysis for the determination of dry molecular weight.

(d) Method 4—Determination of moisture content in stack gases.

(e) Method 5—Determination of particulate matter emissions from stationary sources.

1.5 Limitations. You cannot use this method to measure emissions in which water droplets are present because the size separation of the water droplets may not be representative of the dry particle size released into the air. To measure filterable PM₁₀ and PM_{2.5} in emissions where water droplets are known to exist, we recommend that you use Method 5 of appendix A–3 to part 60. Because of the temperature limit of the O-rings used in this sampling train, you must follow the procedures in Section 8.6.1 to test emissions from stack gas temperatures exceeding 205 °C (400 °F).

1.6 Conditions. You can use this method to obtain particle sizing at 10 micrometers and or 2.5 micrometers if you sample within 80 and 120 percent of isokinetic flow. You can also use this method to obtain total filterable particulate if you sample within 90 to 110 percent of isokinetic flow, the number of sampling points is the same as required by Method 5 of appendix A–3 to part 60 or Method 17 of appendix A–6 to part 60, and the filter temperature is within an acceptable range for these methods. For Method 5, the acceptable range for the filter temperature is generally 120 °C (248 °F) unless a higher or lower temperature is specified. The acceptable range varies depending on the source, control technology and applicable rule or permit condition. To satisfy Method 5 criteria, you may need to remove the in-stack filter and use an out-of-stack filter and recover the PM in the probe between the PM_{2.5} particle sizer and the filter. In addition, to satisfy Method 5 and Method 17 criteria, you may need to sample from more than 12 traverse points. Be aware that this method determines in-stack PM₁₀ and PM_{2.5} filterable emissions by sampling from a recommended maximum of 12 sample points, at a constant flow rate through the train (the constant flow is necessary to maintain the size cuts of the cyclones), and with a filter that is at the stack

temperature. In contrast, Method 5 or Method 17 trains are operated isokinetically with varying flow rates through the train. Method 5 and Method 17 require sampling from as many as 24 sample points. Method 5 uses an out-of-stack filter that is maintained at a constant temperature of 120 °C (248 °F). Further, to use this method in place of Method 5 or Method 17, you must extend the sampling time so that you collect the minimum mass necessary for weighing each portion of this sampling train. Also, if you are using this method as an alternative to a test method specified in a regulatory requirement (e.g., a requirement to conduct a compliance or performance test), then you must receive approval from the authority that established the regulatory requirement before you conduct the test.

2.0 Summary of Method

2.1 Summary. To measure PM₁₀ and PM_{2.5}, extract a sample of gas at a predetermined constant flow rate through an in-stack sizing device. The particle-sizing device separates particles with nominal aerodynamic diameters of 10 micrometers and 2.5 micrometers. To minimize variations in the isokinetic sampling conditions, you must establish well-defined limits. After a sample is obtained, remove uncombined water from the particulate, then use gravimetric analysis to determine the particulate mass for each size fraction. The original method, as promulgated in 1990, has been changed by adding a PM_{2.5} cyclone downstream of the PM₁₀ cyclone. Both cyclones were developed and evaluated as part of a conventional five-stage cascade cyclone train. The addition of a PM_{2.5} cyclone between the PM₁₀ cyclone and the stack temperature filter in the sampling train supplements the measurement of PM₁₀ with the measurement of PM_{2.5}. Without the addition of the PM_{2.5} cyclone, the filterable particulate portion of the sampling train may be used to measure total and PM₁₀ emissions. Likewise, with the exclusion of the PM₁₀ cyclone, the filterable particulate portion of the sampling train may be used to measure total and PM_{2.5} emissions. Figure 1 of Section 17 presents the schematic of the sampling train configured with this change.

3.0 Definitions

3.1 *Condensable particulate matter (CPM)* means material that is vapor phase at stack conditions, but condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. Note that all CPM is assumed to be in the PM_{2.5} size fraction.

3.2 *Constant weight* means a difference of no more than 0.5 mg or one percent of total weight less tare weight, whichever is greater, between two consecutive weighings, with no less than six hours of desiccation time between weighings.

3.3 *Filterable particulate matter (PM)* means particles that are emitted directly by a source as a solid or liquid at stack or release conditions and captured on the filter of a stack test train.

3.4 *Primary particulate matter (PM)* (also known as direct PM) means particles that enter the atmosphere as a direct emission

from a stack or an open source. Primary PM has two components: Filterable PM and condensable PM. These two PM components have no upper particle size limit.

3.5 *Primary PM_{2.5}* (also known as direct PM_{2.5}, total PM_{2.5}, PM_{2.5}, or combined filterable PM_{2.5} and condensable PM) means PM with an aerodynamic diameter less than or equal to 2.5 micrometers. These solid particles are emitted directly from an air emissions source or activity, or are the gaseous or vaporous emissions from an air emissions source or activity that condense to form PM at ambient temperatures. Direct PM_{2.5} emissions include elemental carbon, directly emitted organic carbon, directly emitted sulfate, directly emitted nitrate, and other inorganic particles (including but not limited to crustal material, metals, and sea salt).

3.6 *Primary PM₁₀* (also known as direct PM₁₀, total PM₁₀, PM₁₀, or the combination of filterable PM₁₀ and condensable PM) means PM with an aerodynamic diameter equal to or less than 10 micrometers.

4.0 Interferences

You cannot use this method to measure emissions where water droplets are present because the size separation of the water droplets may not be representative of the dry particle size released into the air. Stacks with entrained moisture droplets may have water droplets larger than the cut sizes for the cyclones. These water droplets normally contain particles and dissolved solids that become PM₁₀ and PM_{2.5} following evaporation of the water.

5.0 Safety

5.1 Disclaimer. Because the performance of this method may require the use of hazardous materials, operations, and equipment, you should develop a health and safety plan to ensure the safety of your employees who are on site conducting the particulate emission test. Your plan should conform with all applicable Occupational Safety and Health Administration, Mine Safety and Health Administration, and Department of Transportation regulatory requirements. Because of the unique situations at some facilities and because some facilities may have more stringent requirements than is required by State or federal laws, you may have to develop procedures to conform to the plant health and safety requirements.

6.0 Equipment and Supplies

Figure 2 of Section 17 shows details of the combined cyclone heads used in this method. The sampling train is the same as Method 17 of appendix A-6 to part 60 with the exception of the PM₁₀ and PM_{2.5} sizing devices. The following sections describe the sampling train's primary design features in detail.

6.1 Filterable Particulate Sampling Train Components.

6.1.1 Nozzle. You must use stainless steel (316 or equivalent) or fluoropolymer-coated stainless steel nozzles with a sharp tapered leading edge. We recommend one of the 12 nozzles listed in Figure 3 of Section 17 because they meet design specifications

when PM₁₀ cyclones are used as part of the sampling train. We also recommend that you have a large number of nozzles in small diameter increments available to increase the likelihood of using a single nozzle for the entire traverse. We recommend one of the nozzles listed in Figure 4A or 4B of Section 17 because they meet design specifications when PM_{2.5} cyclones are used without PM₁₀ cyclones as part of the sampling train.

6.1.2 PM₁₀ and PM_{2.5} Sizing Device.

6.1.2.1 Use stainless steel (316 or equivalent) or fluoropolymer-coated PM₁₀ and PM_{2.5} sizing devices. You may use sizing devices constructed of high-temperature specialty metals such as Inconel, Hastelloy, or Haynes 230. (See also Section 8.6.1.) The sizing devices must be cyclones that meet the design specifications shown in Figures 3, 4A, 4B, 5, and 6 of Section 17. Use a caliper to verify that the dimensions of the PM₁₀ and PM_{2.5} sizing devices are within ± 0.02 cm of the design specifications. Example suppliers of PM₁₀ and PM_{2.5} sizing devices include the following:

(a) Environmental Supply Company, Inc., 2142 E. Geer Street, Durham, North Carolina 27704. Telephone No.: (919) 956-9688; Fax: (919) 682-0333.

(b) Apex Instruments, 204 Technology Park Lane, Fuquay-Varina, North Carolina 27526. Telephone No.: (919) 557-7300 (phone); Fax: (919) 557-7110.

6.1.2.2 You may use alternative particle sizing devices if they meet the requirements in Development and Laboratory Evaluation of a Five-Stage Cyclone System, EPA-600/7-78-008 (<http://cfpub.epa.gov/ols>).

6.1.3 Filter Holder. Use a filter holder that is stainless steel (316 or equivalent). A heated glass filter holder may be substituted for the steel filter holder when filtration is performed out-of-stack. Commercial-size filter holders are available depending upon project requirements, including commercial stainless steel filter holders to support 25-, 47-, 63-, 76-, 90-, 101-, and 110-mm diameter filters. Commercial size filter holders contain a fluoropolymer O-ring, a stainless steel screen that supports the particulate filter, and a final fluoropolymer O-ring. Screw the assembly together and attach to the outlet of cyclone IV. The filter must not be compressed between the fluoropolymer O-ring and the filter housing.

6.1.4 Pitot Tube. You must use a pitot tube made of heat resistant tubing. Attach the pitot tube to the probe with stainless steel fittings. Follow the specifications for the pitot tube and its orientation to the inlet nozzle given in Section 6.1.1.3 of Method 5 of appendix A-3 to part 60.

6.1.5 Probe Extension and Liner. The probe extension must be glass- or fluoropolymer-lined. Follow the specifications in Section 6.1.1.2 of Method 5 of appendix A-3 to part 60. If the gas filtration temperature never exceeds 30 °C (85 °F), then the probe may be constructed of stainless steel without a probe liner and the extension is not recovered as part of the PM.

6.1.6 Differential Pressure Gauge, Condensers, Metering Systems, Barometer, and Gas Density Determination Equipment. Follow the requirements in Sections 6.1.1.4

through 6.1.3 of Method 5 of appendix A–3 to part 60, as applicable.

6.2 Sample Recovery Equipment.

6.2.1 Filterable Particulate Recovery. Use the following equipment to quantitatively determine the amount of filterable PM recovered from the sampling train.

(a) Cyclone and filter holder brushes.

(b) Wash bottles. Two wash bottles are recommended. Any container material is acceptable, but wash bottles used for sample and blank recovery must not contribute more than 0.1 mg of residual mass to the CPM measurements.

(c) Leak-proof sample containers. Containers used for sample and blank recovery must not contribute more than 0.05 mg of residual mass to the CPM measurements.

(d) Petri dishes. For filter samples; glass or polyethylene, unless otherwise specified by the Administrator.

(e) Graduated cylinders. To measure condensed water to within 1 ml or 0.5 g. Graduated cylinders must have subdivisions not greater than 2 ml.

(f) Plastic storage containers. Air-tight containers to store silica gel.

6.2.2 Analysis Equipment.

(a) Funnel. Glass or polyethylene, to aid in sample recovery.

(b) Rubber policeman. To aid in transfer of silica gel to container; not necessary if silica gel is weighed in the field.

(c) Analytical balance. Analytical balance capable of weighing at least 0.0001 g (0.1 mg).

(d) Balance. To determine the weight of the moisture in the sampling train components, use an analytical balance accurate to ± 0.5 g.

(e) Fluoropolymer beaker liners.

7.0 Reagents, Standards, and Sampling Media

7.1 Sample Collection. To collect a sample, you will need a filter and silica gel. You must also have water and crushed ice. These items must meet the following specifications.

7.1.1 Filter. Use a nonreactive, nondisintegrating glass fiber, quartz, or polymer filter that does not have an organic binder. The filter must also have an efficiency of at least 99.95 percent (less than 0.05 percent penetration) on 0.3 micrometer dioctyl phthalate particles. You may use test data from the supplier's quality control program to document the PM filter efficiency.

7.1.2 Silica Gel. Use an indicating-type silica gel of 6 to 16 mesh. You must obtain approval from the regulatory authority that established the requirement to use this test method to use other types of desiccants (equivalent or better) before you use them. Allow the silica gel to dry for two hours at 175 °C (350 °F) if it is being reused. You do not have to dry new silica gel if the indicator shows the silica is active for moisture collection.

7.1.3 Crushed Ice. Obtain from the best readily available source.

7.1.4 Water. Use deionized, ultra-filtered water that contains 1.0 part per million by weight (1 milligram/liter) residual mass or less to recover and extract samples.

7.2 Sample Recovery and Analytical Reagents. You will need acetone and

anhydrous calcium sulfate for the sample recovery and analysis. Unless otherwise indicated, all reagents must conform to the specifications established by the Committee on Analytical Reagents of the American Chemical Society. If such specifications are not available, then use the best available grade. Additional information on each of these items is in the following paragraphs.

7.2.1 Acetone. Use acetone that is stored in a glass bottle. Do not use acetone from a metal container because it will likely produce a high residue in the laboratory and field reagent blanks. You must use acetone with blank values less than 1 part per million by weight residue. Analyze acetone blanks prior to field use to confirm low blank values. In no case shall a blank value of greater than 0.0001 percent (1 part per million by weight) of the weight of acetone used in sample recovery be subtracted from the sample weight (i.e., the maximum blank correction is 0.1 mg per 100 ml of acetone used to recover samples).

7.2.2 Particulate Sample Desiccant. Use indicating-type anhydrous calcium sulfate to desiccate samples prior to weighing.

8.0 Sample Collection, Preservation, Storage, and Transport

8.1 Qualifications. This is a complex test method. To obtain reliable results, you should be trained and experienced with in-stack filtration systems (such as cyclones, impactors, and thimbles) and impinger and moisture train systems.

8.2 Preparations. Follow the pretest preparation instructions in Section 8.1 of Method 5 of appendix A–3 to part 60.

8.3 Site Setup. You must complete the following to properly set up for this test:

(a) Determine the sampling site location and traverse points.

(b) Calculate probe/cyclone blockage.

(c) Verify the absence of cyclonic flow.

(d) Complete a preliminary velocity profile and select a nozzle(s) and sampling rate.

8.3.1 Sampling Site Location and Traverse Point Determination. Follow the standard procedures in Method 1 of appendix A–1 to part 60 to select the appropriate sampling site. Choose a location that maximizes the distance from upstream and downstream flow disturbances.

(a) Traverse points. The required maximum number of total traverse points at any location is 12, as shown in Figure 7 of Section 17. You must prevent the disturbance and capture of any solids accumulated on the inner wall surfaces by maintaining a 1-inch distance from the stack wall (0.5 inch for sampling locations less than 36.4 inches in diameter with the pitot tube and 32.4 inches without the pitot tube). During sampling, when the PM_{2.5} cyclone is used without the PM₁₀, traverse points closest to the stack walls may not be reached because the inlet to a PM_{2.5} cyclone is located approximately 2.75 inches from the end of the cyclone. For these cases, you may collect samples using the procedures in Section 11.3.2.2 of Method 1 of appendix A–3 to part 60. You must use the traverse point closest to the unreachable sampling points as replacement for the unreachable points. You must extend the sampling time at the replacement sampling

point to include the duration of the unreachable traverse points.

(b) Round or rectangular duct or stack. If a duct or stack is round with two ports located 90° apart, use six sampling points on each diameter. Use a 3x4 sampling point layout for rectangular ducts or stacks. Consult with the Administrator to receive approval for other layouts before you use them.

(c) Sampling ports. You must determine if the sampling ports can accommodate the in-stack cyclones used in this method. You may need larger diameter sampling ports than those used by Method 5 of appendix A–3 to part 60 or Method 17 of appendix A–6 to part 60 for total filterable particulate sampling. When you use nozzles smaller than 0.16 inch in diameter and either a PM₁₀ or a combined PM₁₀ and PM_{2.5} sampling apparatus, the sampling port diameter may need to be six inches in diameter to accommodate the entire apparatus because the conventional 4-inch diameter port may be too small due to the combined dimension of the PM₁₀ cyclone and the nozzle extending from the cyclone, which will likely exceed the internal diameter of the port. A 4-inch port should be adequate for the single PM_{2.5} sampling apparatus. However, do not use the conventional 4-inch diameter port in any circumstances in which the combined dimension of the cyclone and the nozzle extending from the cyclone exceeds the internal diameter of the port. (**Note:** If the port nipple is short, you may be able to "hook" the sampling head through a smaller port into the duct or stack.)

8.3.2 Probe/Cyclone Blockage Calculations. Follow the procedures in the next two sections, as appropriate.

8.3.2.1 Ducts with diameters greater than 36.4 inches. Based on commercially available cyclone assemblies for this procedure, ducts with diameters greater than 36.4 inches have blockage effects less than three percent, as illustrated in Figure 8 of Section 17. You must minimize the blockage effects of the combination of the in-stack nozzle/cyclones, pitot tube, and filter assembly that you use by keeping the cross-sectional area of the assembly at three percent or less of the cross-sectional area of the duct.

8.3.2.2 Ducts with diameters between 25.7 and 36.4 inches. Ducts with diameters between 25.7 and 36.4 inches have blockage effects ranging from three to six percent, as illustrated in Figure 8 of Section 17. Therefore, when you conduct tests on these small ducts, you must adjust the observed velocity pressures for the estimated blockage factor whenever the combined sampling apparatus blocks more than three percent of the stack or duct (see Sections 8.7.2.2 and 8.7.2.3 on the probe blockage factor and the final adjusted velocity pressure, respectively). (**Note:** Valid sampling with the combined PM_{2.5}/PM₁₀ cyclones cannot be performed with this method if the average stack blockage from the sampling assembly is greater than six percent, i.e., the stack diameter is less than 26.5 inches.)

8.3.3 Cyclonic Flow. Do not use the combined cyclone sampling head at sampling locations subject to cyclonic flow. Also, you must follow procedures in Method 1 of

appendix A–1 to part 60 to determine the presence or absence of cyclonic flow and then perform the following calculations:

(a) As per Section 11.4 of Method 1 of appendix A–1 to part 60, find and record the angle that has a null velocity pressure for each traverse point using an S-type pitot tube.

(b) Average the absolute values of the angles that have a null velocity pressure. Do not use the sampling location if the average absolute value exceeds 20°. (**Note:** You can minimize the effects of cyclonic flow conditions by moving the sampling location, placing gas flow straighteners upstream of the sampling location, or applying a modified sampling approach as described in EPA Guideline Document GD–008, Particulate Emissions Sampling in Cyclonic Flow. You may need to obtain an alternate method approval from the regulatory authority that established the requirement to use this test method prior to using a modified sampling approach.)

8.3.4 Preliminary Velocity Profile.

Conduct a preliminary velocity traverse by following Method 2 of appendix A–1 to part 60 velocity traverse procedures. The purpose of the preliminary velocity profile is to determine all of the following:

(a) The gas sampling rate for the combined probe/cyclone sampling head in order to meet the required particle size cut.

(b) The appropriate nozzle to maintain the required gas sampling rate for the velocity pressure range and isokinetic range. If the isokinetic range cannot be met (e.g., batch processes, extreme process flow or temperature variation), void the sample or use methods subject to the approval of the Administrator to correct the data. The acceptable variation from isokinetic sampling is 80 to 120 percent and no more than 100 ± 29 percent (two out of 12 or five out of 24) sampling points outside of this criteria.

(c) The necessary sampling duration to obtain sufficient particulate catch weights.

8.3.4.1 *Preliminary traverse.* You must use an S-type pitot tube with a conventional thermocouple to conduct the traverse. Conduct the preliminary traverse as close as possible to the anticipated testing time on sources that are subject to hour-by-hour gas flow rate variations of approximately ± 20 percent and/or gas temperature variations of approximately ± 10 °C (± 50 °F). (**Note:** You should be aware that these variations can cause errors in the cyclone cut diameters and the isokinetic sampling velocities.)

8.3.4.2 *Velocity pressure range.* Insert the S-type pitot tube at each traverse point and record the range of velocity pressures measured on data form in Method 2 of appendix A–1 to part 60. You will use this later to select the appropriate nozzle.

8.3.4.3 *Initial gas stream viscosity and molecular weight.* Determine the average gas temperature, average gas oxygen content, average carbon dioxide content, and estimated moisture content. You will use this information to calculate the initial gas stream viscosity (Equation 3) and molecular weight (Equations 1 and 2). (**Note:** You must follow the instructions outlined in Method 4 of appendix A–3 to part 60 or Alternative Moisture Measurement Method Midget

Impingers (ALT–008) to estimate the moisture content. You may use a wet bulb-dry bulb measurement or hand-held hygrometer measurement to estimate the moisture content of sources with gas temperatures less than 71 °C (160 °F).)

8.3.4.4 *Approximate PM concentration in the gas stream.* Determine the approximate PM concentration for the PM_{2.5} and the PM_{2.5} to PM₁₀ components of the gas stream through qualitative measurements or estimates from precious stack particulate emissions tests. Having an idea of the particulate concentration in the gas stream is not essential but will help you determine the appropriate sampling time to acquire sufficient PM weight for better accuracy at the source emission level. The collectable PM weight requirements depend primarily on the types of filter media and weighing capabilities that are available and needed to characterize the emissions. Estimate the collectable PM concentrations in the greater than 10 micrometer, less than or equal to 10 micrometers and greater than 2.5 micrometers, and less than or equal to 2.5 micrometer size ranges. Typical PM concentrations are listed in Table 1 of Section 17. Additionally, relevant sections of AP–42, Compilation of Air Pollutant Emission Factors, may contain particle size distributions for processes characterized in those sections, and appendix B2 of AP–42 contains generalized particle size distributions for nine industrial process categories (e.g., stationary internal combustion engines firing gasoline or diesel fuel, calcining of aggregate or unprocessed ores). The generalized particle size distributions can be used if source-specific particle size distributions are unavailable. Appendix B2 of AP–42 also contains typical collection efficiencies of various particulate control devices and example calculations showing how to estimate uncontrolled total particulate emissions, uncontrolled size-specific emissions, and controlled size-specific particulate emissions. (<http://www.epa.gov/ttnchie1/ap42>.)

8.4 Pre-test Calculations. You must perform pre-test calculations to help select the appropriate gas sampling rate through cyclone I (PM₁₀) and cyclone IV (PM_{2.5}). Choosing the appropriate sampling rate will allow you to maintain the appropriate particle cut diameters based upon preliminary gas stream measurements, as specified in Table 2 of Section 17.

8.4.1 *Gas Sampling Rate.* The gas sampling rate is defined by the performance curves for both cyclones, as illustrated in Figure 10 of Section 17. You must use the calculations in Section 8.5 to achieve the appropriate cut size specification for each cyclone. The optimum gas sampling rate is the overlap zone defined as the range below the cyclone IV 2.25 micrometer curve down to the cyclone I 11.0 micrometer curve (area between the two dark, solid lines in Figure 10 of Section 17).

8.4.2 *Choosing the Appropriate Sampling Rate.* You must select a gas sampling rate in the middle of the overlap zone (discussed in Section 8.4.1), as illustrated in Figure 10 of Section 17, to maximize the acceptable tolerance for slight variations in flow

characteristics at the sampling location. The overlap zone is also a weak function of the gas composition. (**Note:** The acceptable range is limited, especially for gas streams with temperatures less than approximately 100 °F. At lower temperatures, it may be necessary to perform the PM₁₀ and PM_{2.5} separately in order to meet the necessary particle size criteria shown in Table 2 of Section 17.)

8.5 Test Calculations. You must perform all of the calculations in Table 3 of Section 17 and the calculations described in Sections 8.5.1 through 8.5.5.

8.5.1 *Assumed Reynolds Number.* You must select an assumed Reynolds number (N_{re}) using Equation 10 and an estimated sampling rate or from prior experience under the stack conditions determined using Methods 1 through 4 to part 60. You will perform initial test calculations based on an assumed N_{re} for the test to be performed. You must verify the assumed N_{re} by substituting the sampling rate (Q_s) calculated in Equation 7 into Equation 10. Then use Table 5 of Section 17 to determine if the N_{re} used in Equation 5 was correct.

8.5.2 *Final Sampling Rate.* Recalculate the final Q_s if the assumed N_{re} used in your initial calculation is not correct. Use Equation 7 to recalculate the optimum Q_s .

8.5.3 *Meter Box ΔH .* Use Equation 11 to calculate the meter box orifice pressure drop (ΔH) after you calculate the optimum sampling rate and confirm the N_{re} . (**Note:** The stack gas temperature may vary during the test, which could affect the sampling rate. If the stack gas temperature varies, you must make slight adjustments in the meter box ΔH to maintain the correct constant cut diameters. Therefore, use Equation 11 to recalculate the ΔH values for 50 °F above and below the stack temperature measured during the preliminary traverse (see Section 8.3.4.1), and document this information in Table 4 of Section 17.)

8.5.4 *Choosing a Sampling Nozzle.* Select one or more nozzle sizes to provide for near isokinetic sampling rate (see Section 1.6). This will also minimize an isokinetic sampling error for the particles at each point. First calculate the mean stack gas velocity (v_s) using Equation 13. See Section 8.7.2 for information on correcting for blockage and use of different pitot tube coefficients. Then use Equation 14 to calculate the diameter (D) of a nozzle that provides for isokinetic sampling at the mean v_s at flow Q_s . From the available nozzles one size smaller and one size larger than this diameter, D, select the most appropriate nozzle. Perform the following steps for the selected nozzle.

8.5.4.1 *Minimum/maximum nozzle/stack velocity ratio.* Use Equation 15 to determine the velocity of gas in the nozzle. Use Equation 16 to calculate the minimum nozzle/stack velocity ratio (R_{min}). Use Equation 17 to calculate the maximum nozzle/stack velocity ratio (R_{max}).

8.5.4.2 *Minimum gas velocity.* Use Equation 18 to calculate the minimum gas velocity (v_{min}) if R_{min} is an imaginary number (negative value under the square root function) or if R_{min} is less than 0.5. Use Equation 19 to calculate v_{min} if R_{min} is ≥ 0.5 .

8.5.4.3 *Maximum stack velocity.* Use Equation 20 to calculate the maximum stack

velocity (v_{\max}) if R_{\max} is less than 1.5. Use Equation 21 to calculate the stack velocity if R_{\max} is ≥ 1.5 .

8.5.4.4 Conversion of gas velocities to velocity pressure. Use Equation 22 to convert v_{\min} to minimum velocity pressure, Δp_{\min} . Use Equation 23 to convert v_{\max} to maximum velocity pressure, Δp_{\max} .

8.5.4.5 Comparison to observed velocity pressures. Compare minimum and maximum velocity pressures with the observed velocity pressures at all traverse points during the preliminary test (see Section 8.3.4.2).

8.5.5 Optimum Sampling Nozzle. The nozzle you selected is appropriate if all the observed velocity pressures during the preliminary test fall within the range of the Δp_{\min} and Δp_{\max} . Make sure the following requirements are met then follow the procedures in Sections 8.5.5.1 and 8.5.5.2.

(a) Choose an optimum nozzle that provides for isokinetic sampling conditions as close to 100 percent as possible. This is prudent because even if there are slight variations in the gas flow rate, gas temperature, or gas composition during the actual test, you have the maximum assurance of satisfying the isokinetic criteria. Generally, one of the two candidate nozzles selected will be closer to optimum (see Section 8.5.4).

(b) When testing is for $PM_{2.5}$ only, you are allowed a 16 percent failure rate, rounded to the nearest whole number, of sampling points that are outside the range of the Δp_{\min} and Δp_{\max} . If the coarse fraction for PM_{10} determination is included, you are allowed only an eight percent failure rate of the sampling points, rounded to the nearest whole number, outside the Δp_{\min} and Δp_{\max} .

8.5.5.1 Precheck. Visually check the selected nozzle for dents before use.

8.5.5.2 Attach the pre-selected nozzle. Screw the pre-selected nozzle onto the main body of cyclone I using fluoropolymer tape. Use a union and cascade adaptor to connect the cyclone IV inlet to the outlet of cyclone I (see Figure 2 of Section 17).

8.6 Sampling Train Preparation. A schematic of the sampling train used in this method is shown in Figure 1 of Section 17. First, assemble the train and complete the leak check on the combined cyclone sampling head and pitot tube. Use the following procedures to prepare the sampling train. (**Note:** Do not contaminate the sampling train during preparation and assembly. Keep all openings, where contamination can occur, covered until just prior to assembly or until sampling is about to begin.)

8.6.1 Sampling Head and Pitot Tube. Assemble the combined cyclone train. The O-rings used in the train have a temperature limit of approximately 205 °C (400 °F). Use cyclones with stainless steel sealing rings for stack temperatures above 205 °C (400 °F) up to 260 °C (500 °F). You must also keep the nozzle covered to protect it from nicks and scratches. This method may not be suitable for sources with stack gas temperatures exceeding 260 °C (500 °F) because the threads of the cyclone components may gall or seize, thus preventing the recovery of the collected PM and rendering the cyclone unusable for subsequent use. You may use stainless steel cyclone assemblies constructed with bolt-together rather than

screw-together assemblies at temperatures up to 538 °C (1,000 °F). You must use “break-away” or expendable stainless steel bolts that can be over-torqued and broken if necessary to release cyclone closures, thus allowing you to recover PM without damaging the cyclone flanges or contaminating the samples. You may need to use specialty metals to achieve reliable particulate mass measurements above 538 °C (1,000 °F). The method can be used at temperatures up to 1,371 °C (2,500 °F) using specially constructed high-temperature stainless steel alloys (Hastelloy or Haynes 230) with bolt-together closures using break-away bolts.

8.6.2 Filterable Particulate Filter Holder and Pitot Tube. Attach the pre-selected filter holder to the end of the combined cyclone sampling head (see Figure 2 of Section 17). Attach the S-type pitot tube to the combined cyclones after the sampling head is fully attached to the end of the probe. (**Note:** The pitot tube tip must be mounted slightly beyond the combined head cyclone sampling assembly and at least one inch off the gas flow path into the cyclone nozzle. This is similar to the pitot tube placement in Method 17 of appendix A–6 to part 60.) Securely fasten the sensing lines to the outside of the probe to ensure proper alignment of the pitot tube. Provide unions on the sensing lines so that you can connect and disconnect the S-type pitot tube tips from the combined cyclone sampling head before and after each run. Calibrate the pitot tube on the sampling head according to the most current ASTM International D3796 because the cyclone body is a potential source flow disturbance and will change the pitot coefficient value from the baseline (isolated tube) value.

8.6.3 Filter. You must number and tare the filters before use. To tare the filters, desiccate each filter at 20 ± 5.6 °C (68 ± 10 °F) and ambient pressure for at least 24 hours and weigh at intervals of at least six hours to a constant weight. (See Section 3.0 for a definition of constant weight.) Record results to the nearest 0.1 mg. During each weighing, the filter must not be exposed to the laboratory atmosphere for longer than two minutes and a relative humidity above 50 percent. Alternatively, the filters may be oven-dried at 104 °C (220 °F) for two to three hours, desiccated for two hours, and weighed. Use tweezers or clean disposable surgical gloves to place a labeled (identified) and pre-weighed filter in the filter holder. You must center the filter and properly place the gasket so that the sample gas stream will not circumvent the filter. The filter must not be compressed between the gasket and the filter housing. Check the filter for tears after the assembly is completed. Then screw or clamp the filter housing together to prevent the seal from leaking.

8.6.4 Moisture Trap. If you are measuring only filterable particulate (or you are sure that the gas filtration temperature will be maintained below 30 °C (85 °F)), then an empty modified Greenburg Smith impinger followed by an impinger containing silica gel is required. Alternatives described in Method 5 of appendix A–3 to part 60 may also be used to collect moisture that passes through the ambient filter. If you are measuring condensable PM in combination with this

method, then follow the procedures in Method 202 of appendix M of this part for moisture collection.

8.6.5 Leak Check. Use the procedures outlined in Section 8.4 of Method 5 of appendix A–3 to part 60 to leak check the entire sampling system. Specifically perform the following procedures:

8.6.5.1 Sampling train. You must pretest the entire sampling train for leaks. The pretest leak check must have a leak rate of not more than 0.02 actual cubic feet per minute or four percent of the average sample flow during the test run, whichever is less. Additionally, you must conduct the leak check at a vacuum equal to or greater than the vacuum anticipated during the test run. Enter the leak check results on the analytical data sheet (see Section 11.1) for the specific test. (**Note:** Do not conduct a leak check during port changes.)

8.6.5.2 Pitot tube assembly. After you leak check the sample train, perform a leak check of the pitot tube assembly. Follow the procedures outlined in Section 8.4.1 of Method 5 of appendix A–3 to part 60.

8.6.6 Sampling Head. You must preheat the combined sampling head to the stack temperature of the gas stream at the test location (± 10 °C, ± 50 °F). This will heat the sampling head and prevent moisture from condensing from the sample gas stream.

8.6.6.1 Warmup. You must complete a passive warmup (of 30–40 min) within the stack before the run begins to avoid internal condensation.

8.6.6.2 Shortened warmup. You can shorten the warmup time by thermostated heating outside the stack (such as by a heat gun). Then place the heated sampling head inside the stack and allow the temperature to equilibrate.

8.7 Sampling Train Operation. Operate the sampling train the same as described in Section 4.1.5 of Method 5 of appendix A–3 to part 60, but use the procedures in this section for isokinetic sampling and flow rate adjustment. Maintain the flow rate calculated in Section 8.4.1 throughout the run, provided the stack temperature is within 28 °C (50 °F) of the temperature used to calculate ΔH . If stack temperatures vary by more than 28 °C (50 °F), use the appropriate ΔH value calculated in Section 8.5.3. Determine the minimum number of traverse points as in Figure 7 of Section 17. Determine the minimum total projected sampling time based on achieving the data quality objectives or emission limit of the affected facility. We recommend that you round the number of minutes sampled at each point to the nearest 15 seconds. Perform the following procedures:

8.7.1 Sample Point Dwell Time. You must calculate the flow rate-weighted dwell time (that is, sampling time) for each sampling point to ensure that the overall run provides a velocity-weighted average that is representative of the entire gas stream. Vary the dwell time at each traverse point proportionately with the point velocity. Calculate the dwell time at each of the traverse points using Equation 24. You must use the data from the preliminary traverse to determine the average velocity pressure (Δp_{avg}). You must use the velocity pressure

measured during the sampling run to determine the velocity pressure at each point (Δp_v). Here, N_{ip} equals the total number of traverse points. Each traverse point must have a dwell time of at least two minutes.

8.7.2 Adjusted Velocity Pressure. When selecting your sampling points using your preliminary velocity traverse data, your preliminary velocity pressures must be adjusted to take into account the increase in velocity due to blockage. Also, you must adjust your preliminary velocity data for differences in pitot tube coefficients. Use the following instructions to adjust the preliminary velocity pressure.

8.7.2.1 Different pitot tube coefficient. You must use Equation 25 to correct the recorded preliminary velocity pressures if the pitot tube mounted on the combined cyclone sampling head has a different pitot tube coefficient than the pitot tube used during the preliminary velocity traverse (see Section 8.3.4).

8.7.2.2 Probe blockage factor. You must use Equation 26 to calculate an average probe blockage correction factor (b_p) if the diameter of your stack or duct is between 25.7 and 36.4 inches for the combined PM_{2.5}/PM₁₀ sampling head and pitot and between 18.8 and 26.5 inches for the PM_{2.5} cyclone and pitot. A probe blockage factor is calculated because of the flow blockage caused by the relatively large cross-sectional area of the cyclone sampling head, as discussed in Section 8.3.2.2 and illustrated in Figures 8 and 9 of Section 17. You must determine the cross-sectional area of the cyclone head you use and determine its stack blockage factor. (**Note:** Commercially-available sampling heads (including the PM₁₀ cyclone, PM_{2.5} cyclone, pitot and filter holder) have a projected area of approximately 31.2 square inches when oriented into the gas stream. As the probe is moved from the most outer to the most inner point, the amount of blockage that actually occurs ranges from approximately 13 square inches to the full 31.2 inches plus the blockage caused by the probe extension. The average cross-sectional area blocked is 22 square inches.)

8.7.2.3 Final adjusted velocity pressure. Calculate the final adjusted velocity pressure (Δp_{v2}) using Equation 27. (**Note:** Figures 8 and 9 of Section 17 illustrate that the blockage effect of the combined PM₁₀, PM_{2.5} cyclone sampling head, and pitot tube increases rapidly below stack diameters of 26.5 inches. Therefore, the combined PM₁₀, PM_{2.5} filter sampling head and pitot tube is not applicable for stacks with a diameter less than 26.5 inches because the blockage is greater than six percent. For stacks with a diameter less than 26.5 inches, PM_{2.5} particulate measurements may be possible using only a PM_{2.5} cyclone, pitot tube, and in-stack filter. If the blockage exceeds three percent but is less than six percent, you must follow the procedures outlined in Method 1A of appendix A-1 to part 60 to conduct tests. You must conduct the velocity traverse downstream of the sampling location or immediately before the test run.

8.7.3 Sample Collection. Collect samples the same as described in Section 4.1.5 of Method 5 of appendix A-3 to part 60, except use the procedures in this section for

isokinetic sampling and flow rate adjustment. Maintain the flow rate calculated in Section 8.5 throughout the run, provided the stack temperature is within 28 °C (50 °F) of the temperature used to calculate ΔH . If stack temperatures vary by more than 28 °C (50 °F), use the appropriate ΔH value calculated in Section 8.5.3. Calculate the dwell time at each traverse point as in Equation 24. In addition to these procedures, you must also use running starts and stops if the static pressure at the sampling location is less than minus 5 inches water column. This prevents back pressure from rupturing the sample filter. If you use a running start, adjust the flow rate to the calculated value after you perform the leak check (see Section 8.4).

8.7.3.1 Level and zero manometers. Periodically check the level and zero point of the manometers during the traverse. Vibrations and temperature changes may cause them to drift.

8.7.3.2 Portholes. Clean the portholes prior to the test run. This will minimize the chance of collecting deposited material in the nozzle.

8.7.3.3 Sampling procedures. Verify that the combined cyclone sampling head temperature is at stack temperature. You must maintain the temperature of the cyclone sampling head within ± 10 °C (± 18 °F) of the stack temperature. (**Note:** For many stacks, portions of the cyclones and filter will be external to the stack during part of the sampling traverse. Therefore, you must heat and/or insulate portions of the cyclones and filter that are not within the stack in order to maintain the sampling head temperature at the stack temperature. Maintaining the temperature will ensure proper particle sizing and prevent condensation on the walls of the cyclones.) To begin sampling, remove the protective cover from the nozzle. Position the probe at the first sampling point with the nozzle pointing directly into the gas stream. Immediately start the pump and adjust the flow to calculated isokinetic conditions. Ensure the probe/pitot tube assembly is leveled. (**Note:** When the probe is in position, block off the openings around the probe and porthole to prevent unrepresentative dilution of the gas stream. Take care to minimize contamination from material used to block the flow or insulate the sampling head during collection at the first sampling point.)

(a) Traverse the stack cross-section, as required by Method 1 of appendix A-1 to part 60, with the exception that you are only required to perform a 12-point traverse. Do not bump the cyclone nozzle into the stack walls when sampling near the walls or when removing or inserting the probe through the portholes. This will minimize the chance of extracting deposited materials.

(b) Record the data required on the field test data sheet for each run. Record the initial dry gas meter reading. Then take dry gas meter readings at the following times: the beginning and end of each sample time increment; when changes in flow rates are made; and when sampling is halted. Compare the velocity pressure measurements (Equations 22 and 23) with the velocity pressure measured during the preliminary traverse. Keep the meter box ΔH at the value calculated in Section 8.5.3 for the stack

temperature that is observed during the test. Record all point-by-point data and other source test parameters on the field test data sheet. Do not leak check the sampling system during port changes.

(c) Maintain flow until the sampling head is completely removed from the sampling port. You must restart the sampling flow prior to inserting the sampling head into the sampling port during port changes.

(d) Maintain the flow through the sampling system at the last sampling point. At the conclusion of the test, remove the pitot tube and combined cyclone sampling head from the stack while the train is still operating (running stop). Make sure that you do not scrape the pitot tube or the combined cyclone sampling head against the port or stack walls. Then stop the pump and record the final dry gas meter reading and other test parameters on the field test data sheet. (**Note:** After you stop the pump, make sure you keep the combined cyclone head level to avoid tipping dust from the cyclone cups into the filter and/or down-comer lines.)

8.7.4 Process Data. You must document data and information on the process unit tested, the particulate control system used to control emissions, any non-particulate control system that may affect particulate emissions, the sampling train conditions, and weather conditions. Record the site barometric pressure and stack pressure on the field test data sheet. Discontinue the test if the operating conditions may cause non-representative particulate emissions.

8.7.4.1 Particulate control system data. Use the process and control system data to determine whether representative operating conditions were maintained throughout the testing period.

8.7.4.2 Sampling train data. Use the sampling train data to confirm that the measured particulate emissions are accurate and complete.

8.7.5 Sample Recovery. First remove the sampling head (combined cyclone/filter assembly) from the train probe. After the sample head is removed, perform a post-test leak check of the probe and sample train. Then recover the components from the cyclone/filter. Refer to the following sections for more detailed information.

8.7.5.1 Remove sampling head. After cooling and when the probe can be safely handled, wipe off all external surfaces near the cyclone nozzle and cap the inlet to the cyclone to prevent PM from entering the assembly. Remove the combined cyclone/filter sampling head from the probe. Cap the outlet of the filter housing to prevent PM from entering the assembly.

8.7.5.2 Leak check probe/sample train assembly (post-test). Leak check the remainder of the probe and sample train assembly (including meter box) after removing the combined cyclone head/filter. You must conduct the leak rate at a vacuum equal to or greater than the maximum vacuum achieved during the test run. Enter the results of the leak check onto the field test data sheet. If the leak rate of the sampling train (without the combined cyclone sampling head) exceeds 0.02 actual cubic feet per minute or four percent of the average sampling rate during the test run (whichever

is less), the run is invalid and must be repeated.

8.7.5.3 *Weigh or measure the volume of the liquid collected in the water collection impingers and silica trap.* Measure the liquid in the first impingers to within 1 ml using a clean graduated cylinder or by weighing it to within 0.5 g using a balance. Record the volume of the liquid or weight of the liquid present to be used to calculate the moisture content of the effluent gas.

8.7.5.4 *Weigh the silica impinger.* If a balance is available in the field, weigh the silica impinger to within 0.5 g. Note the color of the indicating silica gel in the last impinger to determine whether it has been completely spent and make a notation of its condition. If you are measuring CPM in combination with this method, the weight of the silica gel can be determined before or after the post-test nitrogen purge is complete (See Section 8.5.3 of Method 202 of appendix M to this part).

8.7.5.5 *Recovery of PM.* Recovery involves the quantitative transfer of particles in the following size range: greater than 10 micrometers; less than or equal to 10 micrometers but greater than 2.5 micrometers; and less than or equal to 2.5 micrometers. You must use a nylon or fluoropolymer brush and an acetone rinse to recover particles from the combined cyclone/filter sampling head. Use the following procedures for each container:

(a) *Container #1, Less than or equal to PM_{2.5} micrometer filterable particulate.* Use tweezers and/or clean disposable surgical gloves to remove the filter from the filter holder. Place the filter in the Petri dish that you labeled with the test identification and Container #1. Using a dry brush and/or a sharp-edged blade, carefully transfer any PM and/or filter fibers that adhere to the filter holder gasket or filter support screen to the Petri dish. Seal the container. This container holds particles less than or equal to 2.5 micrometers that are caught on the in-stack filter. (**Note:** If the test is conducted for PM₁₀ only, then Container #1 would be for less than or equal to PM_{2.5} micrometer filterable particulate.)

(b) *Container #2, Greater than PM₁₀ micrometer filterable particulate.* Quantitatively recover the PM from the cyclone I cup and brush cleaning and acetone rinses of the cyclone cup, internal surface of the nozzle, and cyclone I internal surfaces, including the outside surface of the downcomer line. Seal the container and mark the liquid level on the outside of the container you labeled with test identification and Container #2. You must keep any dust found on the outside of cyclone I and cyclone nozzle external surfaces out of the sample. This container holds PM greater than 10 micrometers.

(c) *Container #3, Filterable particulate less than or equal to 10 micrometer and greater than 2.5 micrometers.* Place the solids from cyclone cup IV and the acetone (and brush cleaning) rinses of the cyclone I turnaround cup (above inner downcomer line), inside of the downcomer line, and interior surfaces of cyclone IV into Container #3. Seal the container and mark the liquid level on the outside of the container you labeled with test

identification and Container #3. This container holds PM less than or equal to 10 micrometers but greater than 2.5 micrometers.

(d) *Container #4, Less than or equal to PM_{2.5} micrometers acetone rinses of the exit tube of cyclone IV and front half of the filter holder.* Place the acetone rinses (and brush cleaning) of the exit tube of cyclone IV and the front half of the filter holder in container #4. Seal the container and mark the liquid level on the outside of the container you labeled with test identification and Container #4. This container holds PM that is less than or equal to 2.5 micrometers.

(e) *Container #5, Cold impinger water.* If the water from the cold impinger used for moisture collection has been weighed in the field, it can be discarded. Otherwise, quantitatively transfer liquid from the cold impinger that follows the ambient filter into a clean sample bottle (glass or plastic). Mark the liquid level on the bottle you labeled with test identification and Container #5. This container holds the remainder of the liquid water from the emission gases. If you collected condensable PM using Method 202 of appendix M to this part in conjunction with using this method, you must follow the procedures in Method 202 of appendix M to this part to recover impingers and silica used to collect moisture.

(f) *Container #6, Silica gel absorbent.* Transfer the silica gel to its original container labeled with test identification and Container #6 and seal. A funnel may make it easier to pour the silica gel without spilling. A rubber policeman may be used as an aid in removing the silica gel from the impinger. It is not necessary to remove the small amount of silica gel dust particles that may adhere to the impinger wall and are difficult to remove. Since the gain in weight is to be used for moisture calculations, do not use any water or other liquids to transfer the silica gel. If the silica gel has been weighed in the field to measure water content, it can be discarded. Otherwise, the contents of Container #6 are weighed during sample analysis.

(g) *Container #7, Acetone field reagent blank.* Take approximately 200 ml of the acetone directly from the wash bottle you used and place it in Container #7 labeled "Acetone Field Reagent Blank."

8.7.6 *Transport Procedures.* Containers must remain in an upright position at all times during shipping. You do not have to ship the containers under dry or blue ice.

9.0 Quality Control

9.1 *Daily Quality Checks.* You must perform daily quality checks of field log books and data entries and calculations using data quality indicators from this method and your site-specific test plan. You must review and evaluate recorded and transferred raw data, calculations, and documentation of testing procedures. You must initial or sign log book pages and data entry forms that were reviewed.

9.2 *Calculation Verification.* Verify the calculations by independent, manual checks. You must flag any suspect data and identify the nature of the problem and potential effect on data quality. After you complete the test,

prepare a data summary and compile all the calculations and raw data sheets.

9.3 *Conditions.* You must document data and information on the process unit tested, the particulate control system used to control emissions, any non-particulate control system that may affect particulate emissions, the sampling train conditions, and weather conditions. Discontinue the test if the operating conditions may cause non-representative particulate emissions.

9.4 *Field Analytical Balance Calibration Check.* Perform calibration check procedures on field analytical balances each day that they are used. You must use National Institute of Standards and Technology (NIST)-traceable weights at a mass approximately equal to the weight of the sample plus container you will weigh.

10.0 *Calibration and Standardization*
Maintain a log of all filterable particulate sampling and analysis calibrations. Include copies of the relevant portions of the calibration and field logs in the final test report.

10.1 *Gas Flow Velocities.* You must use an S-type pitot tube that meets the required EPA specifications (EPA Publication 600/4-77-0217b) during these velocity measurements. (**Note:** If, as specified in Section 8.7.2.3, testing is performed in stacks less than 26.5 inches in diameter, testers may use a standard pitot tube according to the requirements in Method 4A or 5 of appendix A-3 to part 60.) You must also complete the following:

(a) Visually inspect the S-type pitot tube before sampling.

(b) Leak check both legs of the pitot tube before and after sampling.

(c) Maintain proper orientation of the S-type pitot tube while making measurements.

10.1.1 *S-type Pitot Tube Orientation.* The S-type pitot tube is properly oriented when the yaw and the pitch axis are 90 degrees to the air flow.

10.1.2 *Average Velocity Pressure Record.* Instead of recording either high or low values, record the average velocity pressure at each point during flow measurements.

10.1.3 *Pitot Tube Coefficient.* Determine the pitot tube coefficient based on physical measurement techniques described in Method 2 of appendix A-1 to part 60. (**Note:** You must calibrate the pitot tube on the sampling head because of potential interferences from the cyclone body. Refer to Section 8.7.2 for additional information.)

10.2 *Thermocouple Calibration.* You must calibrate the thermocouples using the procedures described in Section 10.3.1 of Method 2 of appendix A-1 to part 60 or Alternative Method 2 Thermocouple Calibration (ALT-011). Calibrate each temperature sensor at a minimum of three points over the anticipated range of use against a NIST-traceable thermometer. Alternatively, a reference thermocouple and potentiometer calibrated against NIST standards can be used.

10.3 *Nozzles.* You may use stainless steel (316 or equivalent), high-temperature steel alloy, or fluoropolymer-coated nozzles for isokinetic sampling. Make sure that all nozzles are thoroughly cleaned, visually inspected, and calibrated according to the

procedure outlined in Section 10.1 of Method 5 of appendix A–3 to part 60.

10.4 Dry Gas Meter Calibration. Calibrate your dry gas meter following the calibration procedures in Section 16.1 of Method 5 of appendix A–3 to part 60. Also, make sure you fully calibrate the dry gas meter to determine the volume correction factor prior to field use. Post-test calibration checks must be performed as soon as possible after the equipment has been returned to the shop. Your pre-test and post-test calibrations must agree within ± 5 percent.

10.5 Glassware. Use class A volumetric glassware for titrations, or calibrate your equipment against NIST-traceable glassware.

11.0 Analytical Procedures

11.1 Analytical Data Sheet. Record all data on the analytical data sheet. Obtain the data sheet from Figure 5–6 of Method 5 of appendix A–3 to part 60. Alternatively, data may be recorded electronically using software applications such as the Electronic Reporting Tool located at http://www.epa.gov/ttn/chief/ert/ert_tool.html.

11.2 Dry Weight of PM. Determine the dry weight of particulate following procedures outlined in this section.

11.2.1 Container #1, Less than or Equal to PM_{2.5} Micrometer Filterable Particulate. Transfer the filter and any loose particulate from the sample container to a tared weighing dish or pan that is inert to solvent or mineral acids. Desiccate for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh to a constant weight and report the results to the nearest 0.1 mg. (See Section 3.0 for a definition of Constant weight.) If constant weight requirements cannot be met, the filter must be treated as described in Section 11.2.1 of Method 202 of appendix M to this part. Extracts resulting from the use of this procedure must be filtered to remove filter fragments before the filter is processed and weighed.

11.2.2 Container #2, Greater than PM₁₀ Micrometer Filterable Particulate Acetone Rinse. Separately treat this container like Container #4.

11.2.3 Container #3, Filterable Particulate Less than or Equal to 10 Micrometer and Greater than 2.5 Micrometers Acetone Rinse. Separately treat this container like Container #4.

11.2.4 Container #4, Less than or Equal to PM_{2.5} Micrometers Acetone Rinse of the Exit Tube of Cyclone IV and Front Half of the Filter Holder. Note the level of liquid in the container and confirm on the analysis sheet whether leakage occurred during transport. If a noticeable amount of leakage has occurred, either void the sample or use methods (subject to the approval of the Administrator) to correct the final results. Quantitatively transfer the contents to a tared 250 ml beaker or tared fluoropolymer beaker liner, and evaporate to dryness at room temperature and pressure in a laboratory hood. Desiccate for 24 hours and weigh to a constant weight. Report the results to the nearest 0.1 mg.

11.2.5 Container #5, Cold Impinger Water. If the amount of water has not been determined in the field, note the level of liquid in the container and confirm on the analysis sheet whether leakage occurred

during transport. If a noticeable amount of leakage has occurred, either void the sample or use methods (subject to the approval of the Administrator) to correct the final results. Measure the liquid in this container either volumetrically to ± 1 ml or gravimetrically to ± 0.5 g.

11.2.6 Container #6, Silica Gel Absorbent. Weigh the spent silica gel (or silica gel plus impinger) to the nearest 0.5 g using a balance. This step may be conducted in the field.

11.2.7 Container #7, Acetone Field Reagent Blank. Use 150 ml of acetone from the blank container used for this analysis. Transfer 150 ml of the acetone to a clean 250-ml beaker or tared fluoropolymer beaker liner. Evaporate the acetone to dryness at room temperature and pressure in a laboratory hood. Following evaporation, desiccate the residue for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh and report the results to the nearest 0.1 mg.

12.0 Calculations and Data Analysis

12.1 Nomenclature. Report results in International System of Units (SI units) unless the regulatory authority that established the requirement to use this test method specifies reporting in English units. The following nomenclature is used.

A = Area of stack or duct at sampling location, square inches.

A_n = Area of nozzle, square feet.

b_f = Average blockage factor calculated in Equation 26, dimensionless.

B_{ws} = Moisture content of gas stream, fraction (e.g., 10 percent H₂O is B_{ws} = 0.10).

C = Cunningham correction factor for particle diameter, D_p, and calculated using the actual stack gas temperature, dimensionless.

%CO₂ = Carbon Dioxide content of gas stream, percent by volume.

C_a = Acetone blank concentration, mg/mg.

C_{IPM10} = Conc. of filterable PM₁₀, gr/DSCF.

C_{IPM2.5} = Conc. of filterable PM_{2.5}, gr/DSCF.

C_p = Pitot coefficient for the combined cyclone pitot, dimensionless.

C_{p'} = Coefficient for the pitot used in the preliminary traverse, dimensionless.

C_r = Re-estimated Cunningham correction factor for particle diameter equivalent to the actual cut size diameter and calculated using the actual stack gas temperature, dimensionless.

C_{if} = Conc. of total filterable PM, gr/DSCF.

C₁ = -150.3162 (micropoise)

C₂ = 18.0614 (micropoise/K^{0.5}) = 13.4622 (micropoise/R^{0.5})

C₃ = 1.19183 $\times 10^6$ (micropoise/K²) = 3.86153 $\times 10^6$ (micropoise/R²)

C₄ = 0.591123 (micropoise)

C₅ = 91.9723 (micropoise)

C₆ = 4.91705 $\times 10^{-5}$ (micropoise/K²) = 1.51761 $\times 10^{-5}$ (micropoise/R²)

D = Inner diameter of sampling nozzle mounted on Cyclone I, inches.

D_p = Physical particle size, micrometers.

D₅₀ = Particle cut diameter, micrometers.

D₅₀₋₁ = Re-calculated particle cut diameters based on re-estimated C_r, micrometers.

D_{50LL} = Cut diameter for cyclone I corresponding to the 2.25 micrometer cut diameter for cyclone IV, micrometers.

D_{50N} = D₅₀ value for cyclone IV calculated during the Nth iterative step, micrometers.

D_{50(N+1)} = D₅₀ value for cyclone IV calculated during the N+1 iterative step, micrometers.

D_{50T} = Cyclone I cut diameter corresponding to the middle of the overlap zone shown in Figure 10 of Section 17, micrometers.

I = Percent isokinetic sampling, dimensionless.

K_p = 85.49, ((ft/sec)/(pounds/mole · °R)).

m_a = Mass of residue of acetone after evaporation, mg.

M_d = Molecular weight of dry gas, pounds/pound mole.

mg = Milligram.

mg/L = Milligram per liter.

M_w = Molecular weight of wet gas, pounds/pound mole.

M₁ = Milligrams of PM collected on the filter, less than or equal to 2.5 micrometers.

M₂ = Milligrams of PM recovered from Container #2 (acetone blank corrected), greater than 10 micrometers.

M₃ = Milligrams of PM recovered from Container #3 (acetone blank corrected), less than or equal to 10 and greater than 2.5 micrometers.

M₄ = Milligrams of PM recovered from Container #4 (acetone blank corrected), less than or equal to 2.5 micrometers.

N_{ip} = Number of iterative steps or total traverse points.

N_{re} = Reynolds number, dimensionless.

%O_{2,wet} = Oxygen content of gas stream, % by volume of wet gas.

(Note: The oxygen percentage used in Equation 3 is on a wet gas basis. That means that since oxygen is typically measured on a dry gas basis, the measured percent O₂ must be multiplied by the quantity (1–B_{ws}) to convert to the actual volume fraction. Therefore, %O_{2,wet} = (1–B_{ws}) * %O_{2,dry})

P_{bar} = Barometric pressure, inches Hg.

P_s = Absolute stack gas pressure, inches Hg.

Q_s = Sampling rate for cyclone I to achieve specified D₅₀.

Q_{sST} = Dry gas sampling rate through the sampling assembly, DSCFM.

Q_I = Sampling rate for cyclone I to achieve specified D₅₀.

R_{max} = Nozzle/stack velocity ratio parameter, dimensionless.

R_{min} = Nozzle/stack velocity ratio parameter, dimensionless.

T_m = Meter box and orifice gas temperature, °R.

t_n = Sampling time at point n, min.

t_r = Total projected run time, min.

T_s = Absolute stack gas temperature, °R.

t₁ = Sampling time at point 1, min.

v_{max} = Maximum gas velocity calculated from Equations 18 or 19, ft/sec.

v_{min} = Minimum gas velocity calculated from Equations 16 or 17, ft/sec.

v_n = Sample gas velocity in the nozzle, ft/sec.

v_s = Velocity of stack gas, ft/sec.

V_a = Volume of acetone blank, ml.

V_{aw} = Volume of acetone used in sample recovery wash, ml.

V_c = Quantity of water captured in impingers and silica gel, ml.

V_m = Dry gas meter volume sampled, ACF.

V_{ms} = Dry gas meter volume sampled, corrected to standard conditions, DSCF.

V_{ws} = Volume of water vapor, SCF.
 V_b = Volume of aliquot taken for IC analysis, ml.
 V_{ic} = Volume of impinger contents sample, ml.
 W_a = Weight of blank residue in acetone used to recover samples, mg.
 $W_{2,3,4}$ = Weight of PM recovered from Containers #2, #3, and #4, mg.
 Z = Ratio between estimated cyclone IV D_{50} values, dimensionless.
 ΔH = Meter box orifice pressure drop, inches W.C.
 $\Delta H_{@}$ = Pressure drop across orifice at flow rate of 0.75 SCFM at standard conditions, inches W.C.
(Note: Specific to each orifice and meter box.)
 $[(\Delta p)^{0.5}]_{avg}$ = Average of square roots of the velocity pressures measured during the preliminary traverse, inches W.C.
 Δp_m = Observed velocity pressure using S-type pitot tube in preliminary traverse, inches W.C.
 Δp_{avg} = Average velocity pressure, inches W.C.
 Δp_{max} = Maximum velocity pressure, inches W.C.
 Δp_{min} = Minimum velocity pressure, inches W.C.
 Δp_n = Velocity pressure measured at point n during the test run, inches W.C.
 Δp_s = Velocity pressure calculated in Equation 25, inches W.C.
 Δp_{s1} = Velocity pressure adjusted for combined cyclone pitot tube, inches W.C.
 Δp_{s2} = Velocity pressure corrected for blockage, inches W.C.
 Δp_1 = Velocity pressure measured at point 1, inches W.C.
 γ = Dry gas meter gamma value, dimensionless.
 μ = Gas viscosity, micropoise.
 θ = Total run time, min.
 ρ_a = Density of acetone, mg/ml (see label on bottle).
12.0 = Constant calculated as 60 percent of 20.5 square inch cross-sectional area of combined cyclone head, square inches.
12.2 Calculations. Perform all of the calculations found in Table 6 of Section 17. Table 6 of Section 17 also provides instructions and references for the calculations.
12.3 Analyses. Analyze D_{50} of cyclone IV and the concentrations of the PM in the various size ranges.

12.3.1 D_{50} of Cyclone IV. To determine the actual D_{50} for cyclone IV, recalculate the Cunningham correction factor and the Reynolds number for the best estimate of cyclone IV D_{50} . The following sections describe additional information on how to recalculate the Cunningham correction factor and determine which Reynolds number to use.

12.3.1.1 *Cunningham correction factor.* Recalculate the initial estimate of the Cunningham correction factor using the actual test data. Insert the actual test run data and D_{50} of 2.5 micrometers into Equation 4. This will give you a new Cunningham correction factor based on actual data.

12.3.1.2 *Initial D_{50} for cyclone IV.* Determine the initial estimate for cyclone IV D_{50} using the test condition Reynolds number calculated with Equation 10 as indicated in Table 3 of Section 17. Refer to the following instructions.

(a) If the Reynolds number is less than 3,162, calculate the D_{50} for cyclone IV with Equation 34, using actual test data.

(b) If the Reynolds number is greater than or equal to 3,162, calculate the D_{50} for cyclone IV with Equation 35 using actual test data.

(c) Insert the “new” D_{50} value calculated by either Equation 34 or 35 into Equation 36 to re-establish the Cunningham Correction Factor (C_r). **(Note:** Use the test condition calculated Reynolds number to determine the most appropriate equation (Equation 34 or 35).)

12.3.1.3 *Re-establish cyclone IV D_{50} .* Use the re-established Cunningham correction factor (calculated in the previous step) and the calculated Reynolds number to determine D_{50-1} .

(a) Use Equation 37 to calculate the re-established cyclone IV D_{50-1} if the Reynolds number is less than 3,162.

(b) Use Equation 38 to calculate the re-established cyclone IV D_{50-1} if the Reynolds number is greater than or equal to 3,162.

12.3.1.4 *Establish “Z” values.* The “Z” value is the result of an analysis that you must perform to determine if the C_r is acceptable. Compare the calculated cyclone IV D_{50} (either Equation 34 or 35) to the re-established cyclone IV D_{50-1} (either Equation 36 or 37) values based upon the test condition calculated Reynolds number (Equation 39). Follow these procedures.

(a) Use Equation 39 to calculate the “Z” values. If the “Z” value is between 0.99 and 1.01, the D_{50-1} value is the best estimate of the cyclone IV D_{50} cut diameter for your test run.

(b) If the “Z” value is greater than 1.01 or less than 0.99, re-establish a C_r based on the D_{50-1} value determined in either Equations 36 or 37, depending upon the test condition Reynolds number.

(c) Use the second revised C_r to re-calculate the cyclone IV D_{50} .

(d) Repeat this iterative process as many times as necessary using the prescribed equations until you achieve the criteria documented in Equation 40.

12.3.2 Particulate Concentration. Use the particulate catch weights in the combined cyclone sampling train to calculate the concentration of PM in the various size ranges. You must correct the concentrations for the acetone blank.

12.3.2.1 *Acetone blank concentration.* Use Equation 42 to calculate the acetone blank concentration (C_a).

12.3.2.2 *Acetone blank residue weight.* Use Equation 44 to calculate the acetone blank weight ($W_{a(2,3,4)}$). Subtract the weight of the acetone blank from the particulate weight catch in each size fraction.

12.3.2.3 *Particulate weight catch per size fraction.* Correct each of the PM weights per size fraction by subtracting the acetone blank weight (i.e., $M_{2,3,4} - W_a$). **(Note:** Do not subtract a blank value of greater than 0.1 mg per 100 ml of the acetone used from the sample recovery.) Use the following procedures.

(a) Use Equation 45 to calculate the PM recovered from Containers #1, #2, #3, and #4. This is the total collectable PM (C_{tf}).

(b) Use Equation 46 to determine the quantitative recovery of PM₁₀ (C_{fPM10}) from Containers #1, #3, and #4.

(c) Use Equation 47 to determine the quantitative recovery of PM_{2.5} ($C_{fPM2.5}$) recovered from Containers #1 and #4.

12.4 Reporting. You must prepare a test report following the guidance in EPA Guidance Document 043, Preparation and Review of Test Reports (December 1998).

12.5 Equations. Use the following equations to complete the calculations required in this test method.

Molecular Weight of Dry Gas. Calculate the molecular weight of the dry gas using Equation 1.

$$M_d = 0.44 (\% CO_2) + 0.32 (\% O_2) + 0.28 (100 - \% O_2 - \% CO_2) \quad (\text{Eq. 1})$$

Molecular Weight of Wet Gas. Calculate the molecular weight of the stack gas on a wet basis using Equation 2.

$$M_w = M_d (1 - B_{ws}) + 18 (B_{ws}) \quad (\text{Eq. 2})$$

Gas Stream Viscosity. Calculate the gas stream viscosity using Equation 3. This

equation uses constants for gas temperatures in °R.

$$\mu = C_1 + C_2 \sqrt{T_s} + C_3 T_s^{-2} + C_4 (\% O_{2, \text{wet}}) - C_5 B_{ws} + C_6 B_{ws} T_s^2 \quad (\text{Eq. 3})$$

Cunningham Correction Factor. The Cunningham correction factor is calculated for a 2.25 micrometer diameter particle.

$$C = 1 + 0.0057193 \left[\frac{\mu}{P_s D_{50}} \right] \left[\frac{T_s}{M_w} \right]^{0.5} \quad (\text{Eq. 4})$$

Lower Limit Cut Diameter for Cyclone I for N_{re} Less than 3,162. The Cunningham correction factor is calculated for a 2.25 micrometer diameter particle.

$$D_{50 \text{ LL}} = 9.507 C^{0.3007} \left[\frac{M_w P_s}{T_s} \right]^{0.1993} \quad (\text{Eq. 5})$$

Cut Diameter for Cyclone I for the Middle of the Overlap Zone.

$$D_{50 \text{ T}} = \left(\frac{11 + D_{50 \text{ LL}}}{2} \right) \quad (\text{Eq. 6})$$

Sampling Rate Using Both PM_{10} and $PM_{2.5}$ Cyclones.

$$Q_s = Q_1 = 0.07296 (\mu) \left[\frac{T_s}{M_w P_s} \right]^{0.2949} \left[\frac{1}{D_{50 \text{ T}}} \right]^{1.4102} \quad (\text{Eq. 7})$$

Sampling Rate Using Only $PM_{2.5}$ Cyclone. For N_{re} Less than 3,162:

$$Q_{IV} = 0.060639 \left[\frac{\mu}{C^{0.4242}} \right] \left[\frac{P_s M_w}{T_s} \right]^{-0.5759} \left[\frac{1}{D_{50}} \right]^{0.8481} \quad (\text{Eq. 8})$$

For N_{re} greater than or equal to 3,162:

$$Q_{IV} = 0.007657 \left[\frac{\mu}{C^{0.6205}} \right] \left[\frac{P_s M_w}{T_s} \right]^{-0.3795} \left[\frac{1}{D_{50}} \right]^{1.241} \quad (\text{Eq. 9})$$

Reynolds Number.

$$N_{re} = 8.64 \times 10^5 \left[\frac{P_s M_w}{T_s} \right] \left[\frac{Q_s}{\mu} \right] \quad (\text{Eq. 10})$$

Meter Box Orifice Pressure Drop.

$$\Delta H = \left[\frac{Q_s (1 - B_{ws}) P_s}{T_s} \right]^2 \left[\frac{1.083 T_m M_d \Delta H_{@}}{P_{bar}} \right] \quad (\text{Eq. 11})$$

Lower Limit Cut Diameter for Cyclone I for N_{re} Greater than or Equal to 3,162. The

Cunningham correction factor is calculated for a 2.25 micrometer diameter particle.

$$D_{50LL} = 10.0959 C^{0.4400} \left[\frac{M_w P_s}{T_s} \right]^{0.0600} \quad (\text{Eq. 12})$$

Velocity of Stack Gas. Correct the mean preliminary velocity pressure for C_p and blockage using Equations 25, 26, and 27.

$$v_s = K_p C_p \left(\sqrt{(\Delta p)} \right)_{avg} \left[\sqrt{\frac{T_s}{P_s M_w}} \right] \quad (\text{Eq. 13})$$

Calculated Nozzle Diameter for Acceptable Sampling Rate.

$$D = \left[\frac{3.056 Q_s}{v_s} \right]^{0.5} \quad (\text{Eq. 14})$$

Velocity of Gas in Nozzle.

$$V_n = \frac{\left(\frac{Q_s}{60 \frac{\text{min}}{\text{s}}} \right)}{A_n} \quad (\text{Eq. 15})$$

Minimum Nozzle/Stack Velocity Ratio Parameter.

$$R_{min} = \left[0.2457 + \left(0.3072 - \frac{0.2603 (\mu) (Q_s)^{0.5}}{v_n^{1.5}} \right)^{0.5} \right] \quad (\text{Eq. 16})$$

Maximum Nozzle/Stack Velocity Ratio Parameter.

$$R_{max} = \left[0.4457 + \left(0.5690 + \frac{0.2603 (\mu) (Q_s)^{0.5}}{v_n^{1.5}} \right)^{0.5} \right] \quad (\text{Eq. 17})$$

Minimum Gas Velocity for R_{min} Less than 0.5.

$$V_{\min} = V_n (0.5) \quad (\text{Eq. 18})$$

Minimum Gas Velocity for R_{\min} Greater than or Equal to 0.5.

$$V_{\min} = V_n R_{\min} \quad (\text{Eq. 19})$$

Maximum Gas Velocity for R_{\max} Less than to 1.5.

$$V_{\max} = V_n R_{\max} \quad (\text{Eq. 20})$$

Maximum Gas Velocity for R_{\max} Greater than or Equal to 1.5.

$$V_{\max} = V_n (1.5) \quad (\text{Eq. 21})$$

Minimum Velocity Pressure.

$$\Delta p_{\min} = 1.3686 \times 10^{-4} \left[\frac{P_s M_w}{T_s} \right] \left[\frac{V_{\min}}{C_p} \right]^2 \quad (\text{Eq. 22})$$

Maximum Velocity Pressure.

$$\Delta p_{\max} = 1.3686 \times 10^{-4} \left[\frac{P_s M_w}{T_s} \right] \left[\frac{V_{\max}}{C_p} \right]^2 \quad (\text{Eq. 23})$$

Sampling Dwell Time at Each Point. N_{tp} is the total number of traverse points. You must use the preliminary velocity traverse data.

$$t_n = \left[\frac{C_p \sqrt{\Delta p_n}}{C^1_p (\sqrt{\Delta p_1})_{\text{avg}}} \right] \left[\frac{t_r}{N_{tp}} \right] \quad (\text{Eq. 24})$$

Adjusted Velocity Pressure.

$$\Delta p_s = \Delta p_m \left[\frac{C_p}{C_p'} \right]^2 \quad (\text{Eq. 25})$$

Average Probe Blockage Factor.

$$b_f = \frac{22.0}{A} \quad (\text{Eq. 26})$$

Velocity Pressure.

$$\Delta p_{s2} = \Delta p_{s1} \left[\frac{1}{(1 - b_f)} \right]^2 \quad (\text{Eq. 27})$$

Dry Gas Volume Sampled at Standard Conditions.

$$V_{ms} = \left[\frac{528}{29.92} \right] [\gamma V_m] \left[\frac{\left(P_{\text{bar}} + \frac{\Delta H}{13.6} \right)}{T_m} \right] \quad (\text{Eq. 28})$$

Sample Flow Rate at Standard Conditions.

$$Q_{sST} = \frac{V_{ms}}{\theta} \quad (\text{Eq. 29})$$

Volume of Water Vapor.

$$V_{ws} = 0.04707 V_c \quad (\text{Eq. 30})$$

Moisture Content of Gas Stream.

$$B_{ws} = \left[\frac{V_{ws}}{V_{ms} + V_{ws}} \right] \quad (\text{Eq. 31})$$

Sampling Rate.

$$Q_s = \frac{29.92}{528} Q_{sST} \left[\frac{1}{(1 - B_{ws})} \right] \left[\frac{T_s}{P_s} \right] \quad (\text{Eq. 32})$$

(Note: The viscosity and Reynolds Number must be recalculated using the actual stack temperature, moisture, and oxygen content.)

Actual Particle Cut Diameter for Cyclone I.
This is based on actual temperatures and pressures measured during the test run.

$$D_{50} = 0.15625 \left[\frac{T_s}{M_w P_s} \right]^{0.2091} \left[\frac{\mu}{Q_s} \right]^{0.7091} \quad (\text{Eq. 33})$$

Particle Cut Diameter for N_{re} Less than 3,162 for Cyclone IV. C must be recalculated

using the actual test data and a D_{50} for 2.5 micrometer diameter particle size.

$$D_{50} = 0.0024302 \left[\frac{\mu}{Q_s} \right]^{1.1791} \left[\frac{1}{C} \right]^{0.5} \left[\frac{T_s}{P_s M_w} \right]^{0.6790} \quad (\text{Eq. 34})$$

Particle Cut Diameter for N_{re} Greater than or Equal to 3,162 for Cyclone IV. C must be recalculated using the actual test run data

and a D_{50} for 2.5 micrometer diameter particle size.

$$D_{50} = 0.019723 \left[\frac{\mu}{Q_s} \right]^{0.8058} \left[\frac{1}{C} \right]^{0.5} \left[\frac{T_s}{P_s M_w} \right]^{0.3058} \quad (\text{Eq. 35})$$

Re-estimated Cunningham Correction Factor. You must use the actual test run Reynolds Number (N_{re}) value and select the

appropriate D_{50} from Equation 33 or 34 (or Equation 37 or 38 if reiterating).

$$C_r = 1 + 0.0057193 \left[\frac{\mu}{P_s D_{50}} \right] \left[\frac{T_s}{M_w} \right]^{0.5} \quad (\text{Eq. 36})$$

Re-calculated Particle Cut Diameter for N_{re} Less than 3,162.

$$D_{50-1} = 0.0024302 \left[\frac{\mu}{Q_s} \right]^{1.1791} \left[\frac{1}{C_r} \right]^{0.5} \left[\frac{T_s}{P_s M_w} \right]^{0.6790} \quad (\text{Eq. 37})$$

Re-calculated Particle Cut Diameter for N Greater than or Equal to 3,162.

$$D_{50-1} = 0.019723 \left[\frac{\mu}{Q_s} \right]^{0.8058} \left[\frac{1}{C_r} \right]^{0.5} \left[\frac{T_s}{P_s M_w} \right]^{0.3058} \quad (\text{Eq. 38})$$

Ratio (Z) Between D_{50} and D_{50-1} Values.

$$Z = \frac{D_{50-1}}{D_{50}} \quad (\text{Eq. 39})$$

Acceptance Criteria for Z Values. The number of iterative steps is represented by N.

$$0.99 \leq \left[Z = \left(\frac{D_{50N}}{D_{50N} + 1} \right) \right] \leq 1.01 \quad (\text{Eq. 40})$$

Percent Isokinetic Sampling.

$$I = \left(\frac{100 T_s V_{ms} 29.92}{60 V_s \theta A_n P_s (1 - B_{ws}) 528} \right) \quad (\text{Eq. 41})$$

Acetone Blank Concentration.

$$C_a = \frac{m_a}{V_a \rho_a} \quad (\text{Eq. 42})$$

Acetone Blank Correction Weight.

M_{(2,3,4)} = W_{(2,3,4)} - W_{a(2,3,4)} (Eq. 43)

Acetone Blank Weight.

W_a = C_a V_{aw} \rho_a (Eq. 44)

Concentration of Total Filterable PM.

C_{t f} = \left(\frac{7000}{453,592} \right) \left[\frac{M_1 + M_2 + M_3 + M_4}{V_{ms}} \right] (Eq. 45)

Concentration of Filterable PM_{10}.

C_{f PM 10} = \left(\frac{7000}{453,592} \right) \left[\frac{M_1 + M_3 + M_4}{V_{ms}} \right] (Eq. 46)

Concentration of Filterable PM_{2.5}.

C_{f PM 2.5} = \left(\frac{7000}{453,592} \right) \left[\frac{M_1 + M_4}{V_{ms}} \right] (Eq. 47)

13.0 Method Performance

13.1 Field evaluation of PM₁₀ and total PM showed that the precision of constant sampling rate method was the same magnitude as Method 17 of appendix A–6 to part 60 (approximately five percent). Precision in PM₁₀ and total PM between multiple trains showed standard deviations of four to five percent and total mass compared to 4.7 percent observed for Method 17 in simultaneous test runs at a Portland cement clinker cooler exhaust. The accuracy of the constant sampling rate PM₁₀ method for total mass, referenced to Method 17, was – 2 ± 4.4 percent (Farthing, 1988a).

13.2 Laboratory evaluation and guidance for PM₁₀ cyclones were designed to limit error due to spatial variations to 10 percent. The maximum allowable error due to an isokinetic sampling was limited to ± 20 percent for 10 micrometer particles in laboratory tests (Farthing, 1988b).

13.3 A field evaluation of the revised Method 201A by EPA showed that the detection limit was 2.54 mg for total filterable PM, 1.44 mg for filterable PM₁₀, and 1.35 mg for PM_{2.5}. The precision resulting from 10 quadruplicate tests (40 test runs) conducted

for the field evaluation was 6.7 percent relative standard deviation. The field evaluation also showed that the blank expected from Method 201A was less than 0.9 mg (EPA, 2010).

14.0 Alternative Procedures

Alternative methods for estimating the moisture content (ALT–008) and thermocouple calibration (ALT–011) can be found at <http://www.epa.gov/ttn/emc/approalt.html>.

15.0 Waste Management

[Reserved]

16.0 References

- (1) Dawes, S.S., and W.E. Farthing. 1990. “Application Guide for Measurement of PM_{2.5} at Stationary Sources,” U.S. Environmental Protection Agency, Atmospheric Research and Exposure Assessment Laboratory, Research Triangle Park, NC, 27511, EPA–600/3–90/057 (NTIS No.: PB 90–247198).
- (2) Farthing, *et al.* 1988a. “PM₁₀ Source Measurement Methodology: Field Studies,” EPA 600/3–88/055, NTIS PB89–194278/AS, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711.

- (3) Farthing, W.E., and S.S. Dawes. 1988b. “Application Guide for Source PM₁₀ Measurement with Constant Sampling Rate,” EPA/600/3–88–057, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711.

- (4) Richards, J.R. 1996. “Test protocol: PCA PM₁₀/PM_{2.5} Emission Factor Chemical Characterization Testing,” PCA R&D Serial No. 2081, Portland Cement Association.

- (5) U.S. Environmental Protection Agency, Federal Reference Methods 1 through 5 and Method 17, 40 CFR part 60, Appendix A–1 through A–3 and A–6.

- (6) U.S. Environmental Protection Agency. 2010. “Field Evaluation of an Improved Method for Sampling and Analysis of Filterable and Condensable Particulate Matter.” Office of Air Quality Planning and Standards, Sector Policy and Program Division Monitoring Policy Group. Research Triangle Park, NC 27711.

17.0 Tables, Diagrams, Flowcharts, and Validation Data

You must use the following tables, diagrams, flowcharts, and data to complete this test method successfully.

TABLE 1—TYPICAL PM CONCENTRATIONS

Particle size range	Concentration and % by weight
Total collectable particulate	0.015 gr/DSCF.
Less than or equal to 10 and greater than 2.5 micrometers	40% of total collectable PM.

TABLE 1—TYPICAL PM CONCENTRATIONS—Continued

Particle size range	Concentration and % by weight
≤ 2.5 micrometers	20% of total collectable PM.

TABLE 2—REQUIRED CYCLONE CUT DIAMETERS (D_{50})

Cyclone	Min. cut diameter (micrometer)	Max. cut diameter (micrometer)
PM ₁₀ Cyclone (Cyclone I from five stage cyclone)	9	11
PM _{2.5} Cyclone (Cyclone IV from five stage cyclone)	2.25	2.75

TABLE 3—TEST CALCULATIONS

If you are using . . .	To calculate . . .	Then use . . .
Preliminary data	Dry gas molecular weight, M_d	Equation 1.
Dry gas molecular weight (M_d) and preliminary moisture content of the gas stream.	wet gas molecular weight, M_w	Equation 2. ^a
Stack gas temperature, and oxygen and moisture content of the gas stream.	gas viscosity, μ	Equation 3.
Gas viscosity, μ	Cunningham correction factor ^b , C	Equation 4.
Reynolds Number ^c (N_{re})	Preliminary lower limit cut diameter for cyclone I, D_{50LL}	Equation 5.
N_{re} less than 3,162		
D_{50LL} from Equation 5	Cut diameter for cyclone I for middle of the overlap zone, D_{50T} .	Equation 6.
D_{50T} from Equation 6	Final sampling rate for cyclone I, $Q_I(Q_s)$	Equation 7.
D_{50} for PM _{2.5} cyclone and N_{re} less than 3,162	Final sampling rate for cyclone IV, Q_{IV}	Equation 8.
D_{50} for PM _{2.5} cyclone and N_{re} greater than or equal to 3,162	Final sampling rate for cyclone IV, Q_{IV}	Equation 9.
$Q_I(Q_s)$ from Equation 7	Verify the assumed Reynolds number, N_{re}	Equation 10.

^a Use Method 4 to determine the moisture content of the stack gas. Use a wet bulb-dry bulb measurement device or hand-held hygrometer to estimate moisture content of sources with gas temperature less than 160 °F.

^b For the lower cut diameter of cyclone IV, 2.25 micrometer.

^c Verify the assumed Reynolds number, using the procedure in Section 8.5.1, before proceeding to Equation 11.

TABLE 4— ΔH VALUES BASED ON PRELIMINARY TRAVERSE DATA

Stack Temperature (°R)	$T_s - 50^\circ$	T_s	$T_s + 50^\circ$
ΔH , (inches W.C.)	a	a	a

^a These values are to be filled in by the stack tester.

TABLE 5—VERIFICATION OF THE ASSUMED REYNOLDS NUMBER

If the N_{re} is . . .	Then . . .	And . . .
Less than 3,162	Calculate ΔH for the meter box	Assume original D_{50LL} is correct
Greater than or equal to 3,162	Recalculate D_{50LL} using Equation 12.	Substitute the “new” D_{50LL} into Equation 6 to recalculate D_{50T} .

TABLE 6—CALCULATIONS FOR RECOVERY OF PM₁₀ AND PM_{2.5}

Calculations	Instructions and References
Average dry gas meter temperature	See field test data sheet.
Average orifice pressure drop	See field test data sheet.
Dry gas volume (V_{ms})	Use Equation 28 to correct the sample volume measured by the dry gas meter to standard conditions (20 °C, 760 mm Hg or 68 °F, 29.92 inches Hg).
Dry gas sampling rate (Q_{sST})	Must be calculated using Equation 29.
Volume of water condensed (V_{ws})	Use Equation 30 to determine the water condensed in the impingers and silica gel combination. Determine the total moisture catch by measuring the change in volume or weight in the impingers and weighing the silica gel.
Moisture content of gas stream (B_{ws})	Calculate this using Equation 31.
Sampling rate (Q_s)	Calculate this using Equation 32.
Test condition Reynolds number ^a	Use Equation 10 to calculate the actual Reynolds number during test conditions.

TABLE 6—CALCULATIONS FOR RECOVERY OF PM₁₀ AND PM_{2.5}—Continued

Calculations	Instructions and References
Actual D ₅₀ of cyclone I	Calculate this using Equation 33. This calculation is based on the average temperatures and pressures measured during the test run.
Stack gas velocity (v _s)	Calculate this using Equation 13.
Percent isokinetic rate (%)	Calculate this using Equation 41.

^a Calculate the Reynolds number at the cyclone IV inlet during the test based on: (1) The sampling rate for the combined cyclone head, (2) the actual gas viscosity for the test, and (3) the dry and wet gas stream molecular weights.

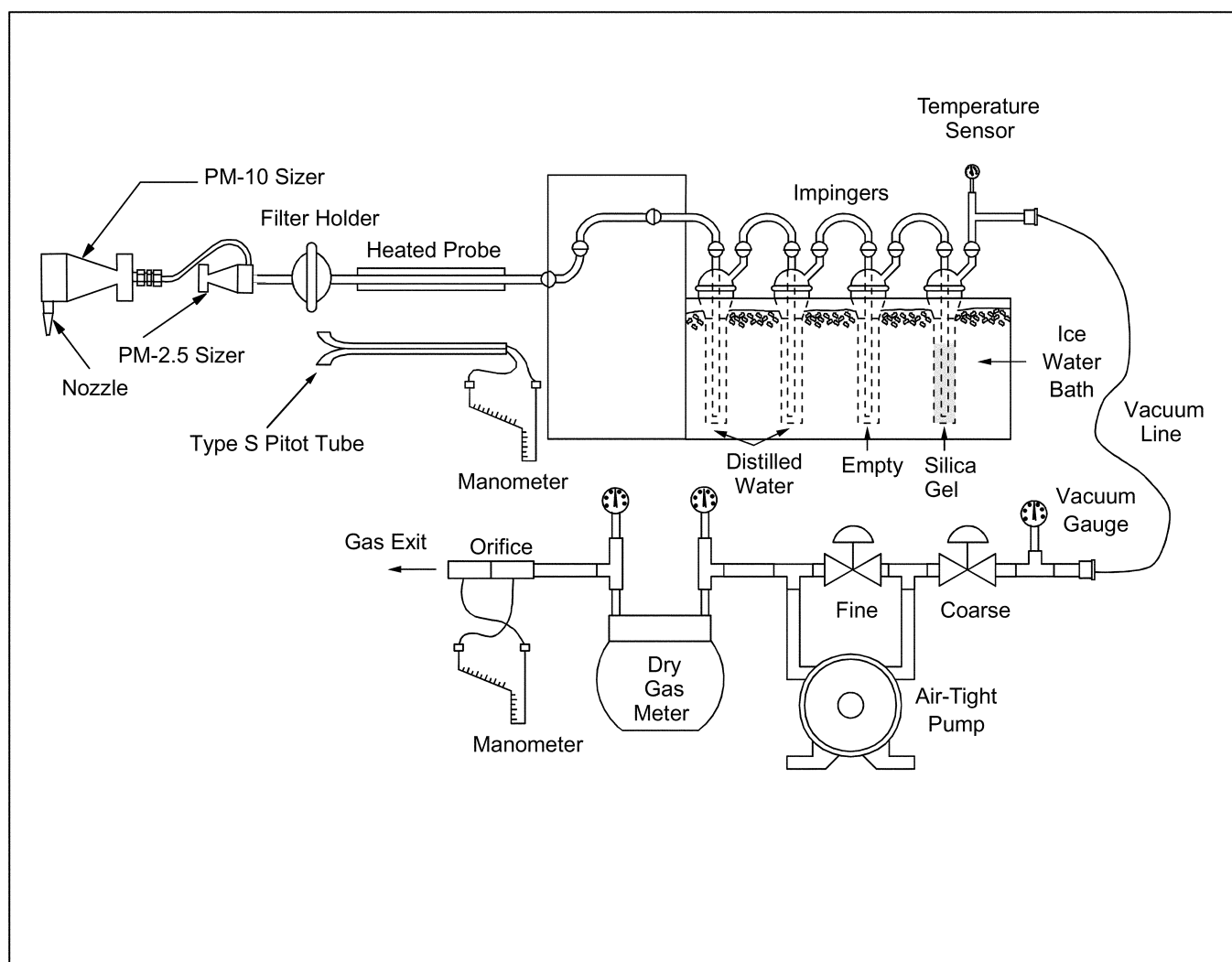


Figure 1. In-stack PM₁₀ and PM_{2.5} Sampling Train

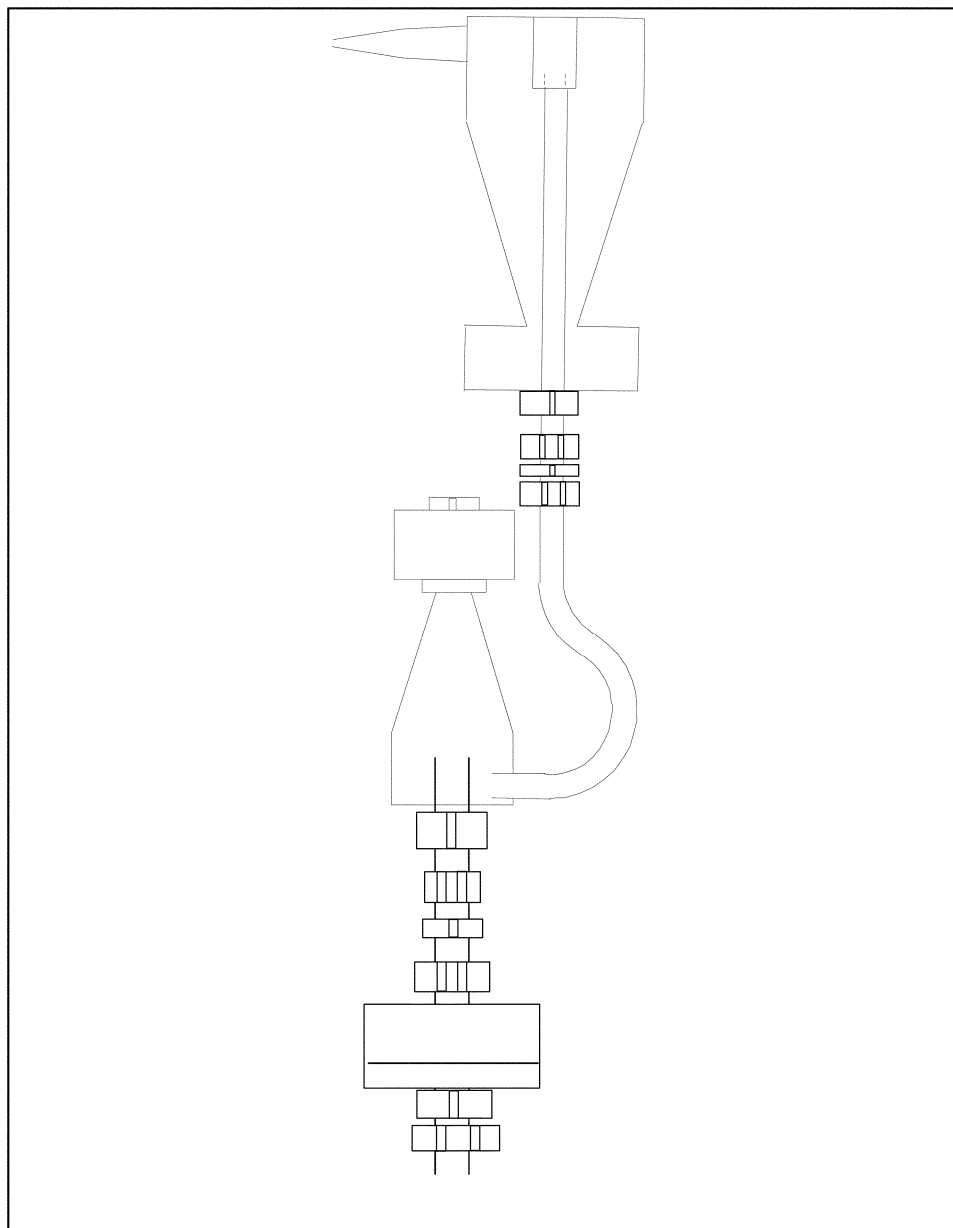
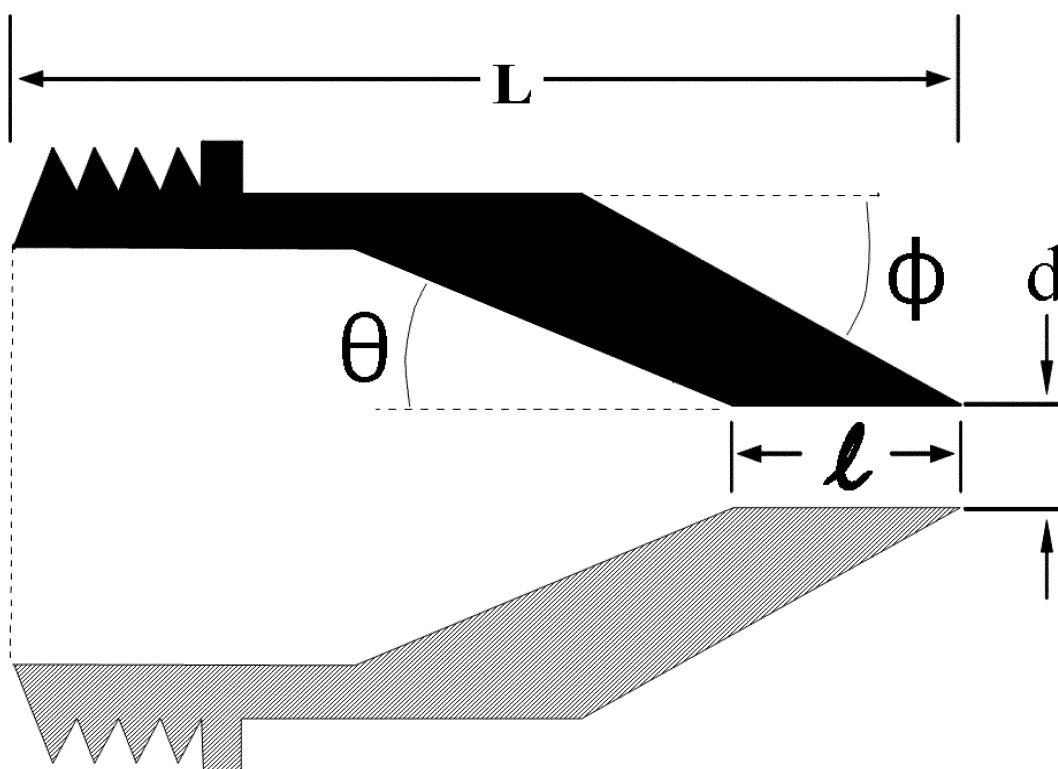
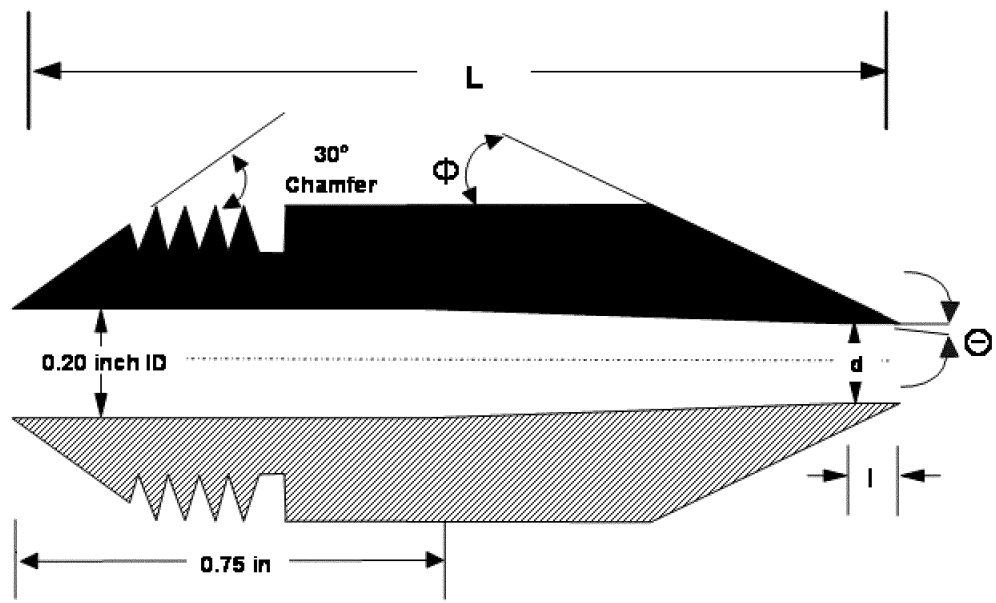


Figure 2. Combined Cyclone Sampling Head



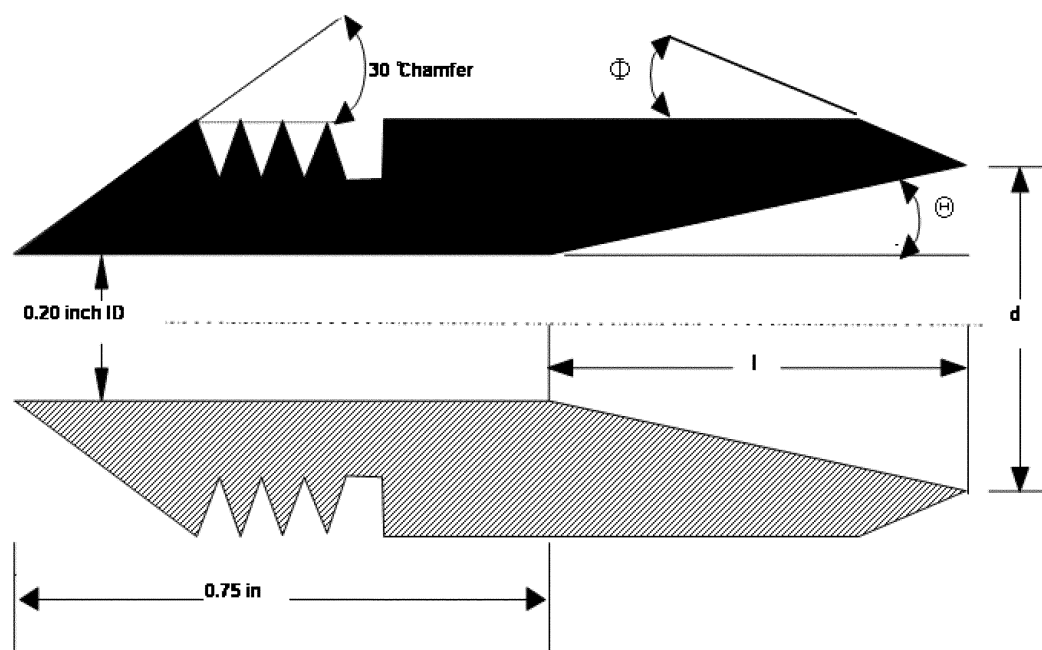
Nozzle Diameter, d (inches)	Cone Angle, θ (degrees)	Outside Taper, ϕ (degrees)	Straight Inlet Length, l inches)	Total Length, L (inches)
0.125	4	15	<0.05	2.710 ± 0.05
0.136	4	15	<0.05	2.653 ± 0.05
0.150	4	15	<0.05	2.553 ± 0.05
0.164	5	15	<0.05	1.970 ± 0.05
0.180	6	15	<0.05	1.572 ± 0.05
0.197	6	15	<0.05	1.491 ± 0.05
0.215	6	15	<0.05	1.450 ± 0.05
0.233	6	15	<0.05	1.450 ± 0.05
0.264	5	15	<0.05	1.450 ± 0.05
0.300	4	15	<0.05	1.480 ± 0.05
0.342	4	15	<0.05	1.450 ± 0.05
0.390	3	15	<0.05	1.450 ± 0.05

Figure 3. Nozzle Design Specifications for PM_{10} Cyclone



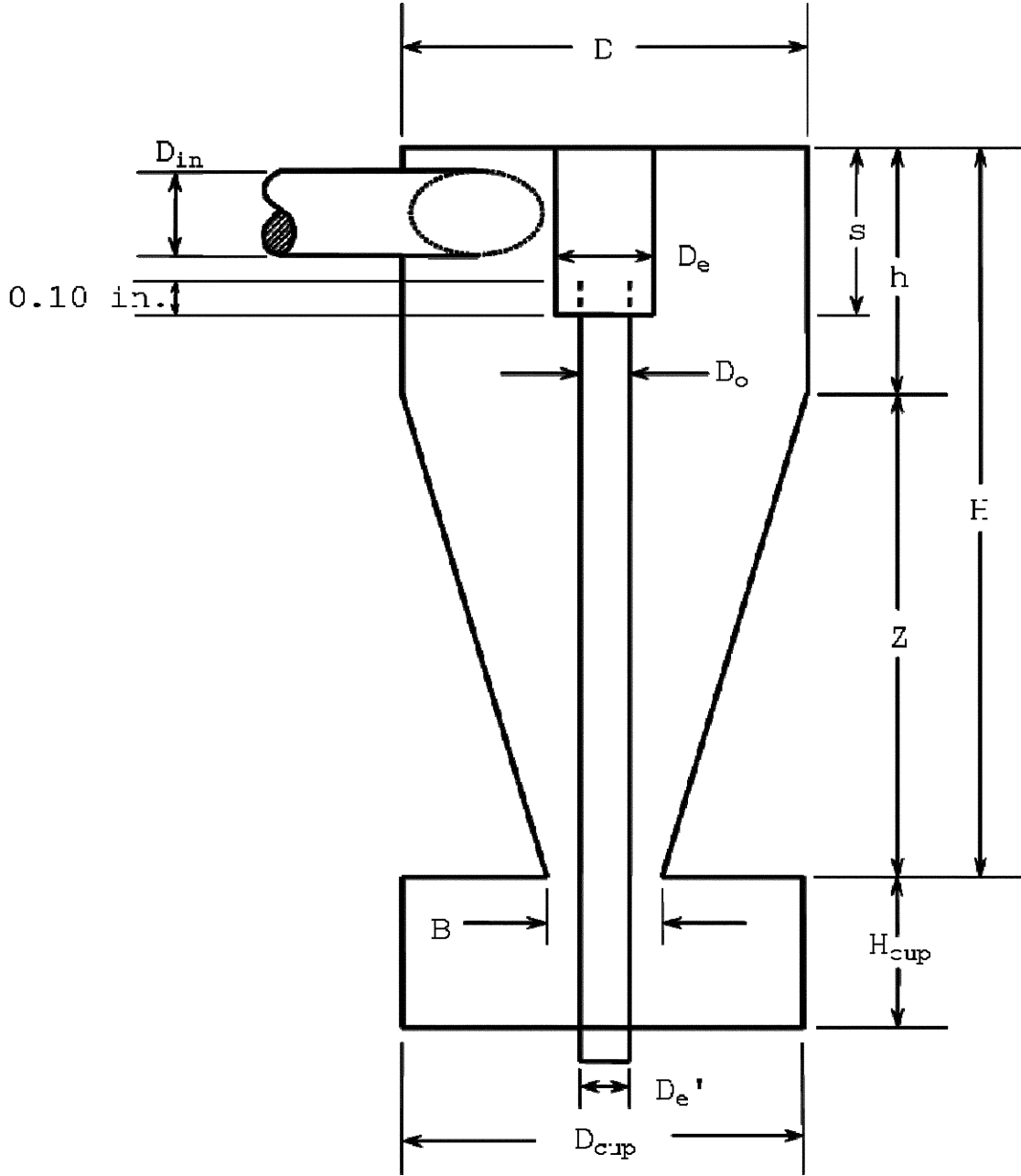
Nozzle Diameter, d (inches)	Internal Cone Angle, θ (degrees)	Outside Taper, Φ (degrees)	Straight Inlet Length, l (inches)	Total Length, L (inches)
0.125	3	15	≤ 0.05	1.45 ± 0.05
0.138	2	15	≤ 0.05	1.45 ± 0.05
0.156	1	15	≤ 0.05	1.45 ± 0.05
0.172	1	15	≤ 0.05	1.45 ± 0.05
0.188	1	15	≤ 0.05	1.45 ± 0.05
0.200	0	15	≤ 0.05	1.45 ± 0.05

Figure 4A. Nozzle Design for PM_{2.5} Cyclone (Higher Stack Flow)



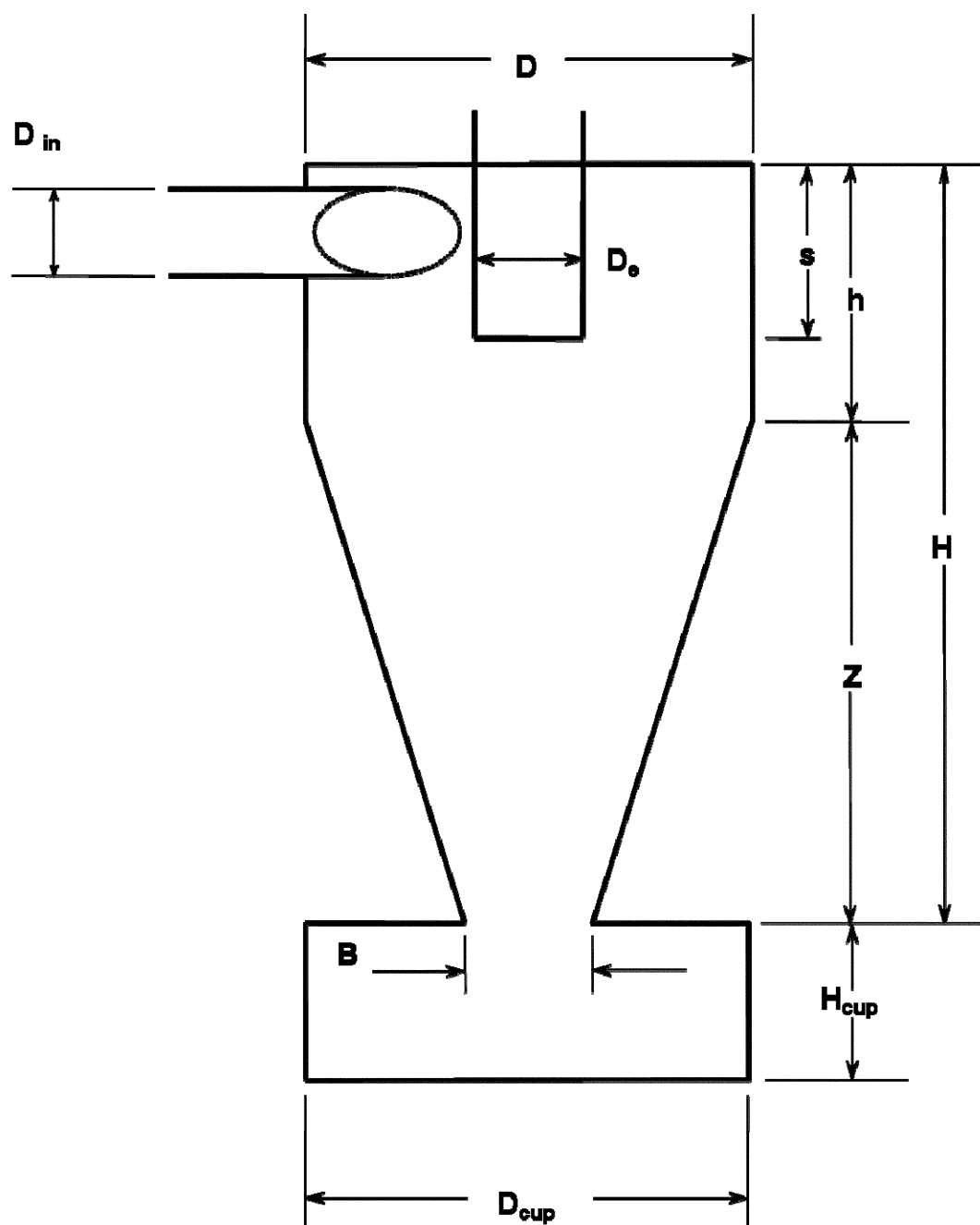
Nozzle diameter, d (inches)	Cone Angle, θ (degrees)	Outside taper, Φ (degrees)	Internal Taper length, l (inches)
0.216	5	15	0.093
0.234	5	15	0.194
0.253	5	15	0.304
0.274	5	15	0.422
0.296	5	15	0.549
0.320	5	15	0.688

Figure 4B. Nozzle Design for PM_{2.5} Cyclone (Lower Stack Flow)



Cyclone I (10 Micrometer)	Cyclone Interior Dimensions (cm ± 0.02 cm)											
	D _{in}	D	D _e	B	H	h	Z	S	H _{cup}	D _{cup}	D _e '	D _o
	1.27	4.47	1.50	1.88	6.95	2.24	4.71	1.57	2.25	4.45	1.02	1.24

Figure 5. Design Specifications for Cyclone I
(10 Micrometer)



Cyclone IV (2.5 Micrometer)	Cyclone Interior Dimensions (cm \pm 0.02 cm)									
	D_{in}	D	D_e	B	H	h	Z	S	H_{cup}	D_{cup}
	0.51	2.54	0.59	1.09	2.68	1.03	1.65	0.58	2.22	2.62

Figure 6. Design Specifications for Cyclone IV (2.5 Micrometer) Sizing Device

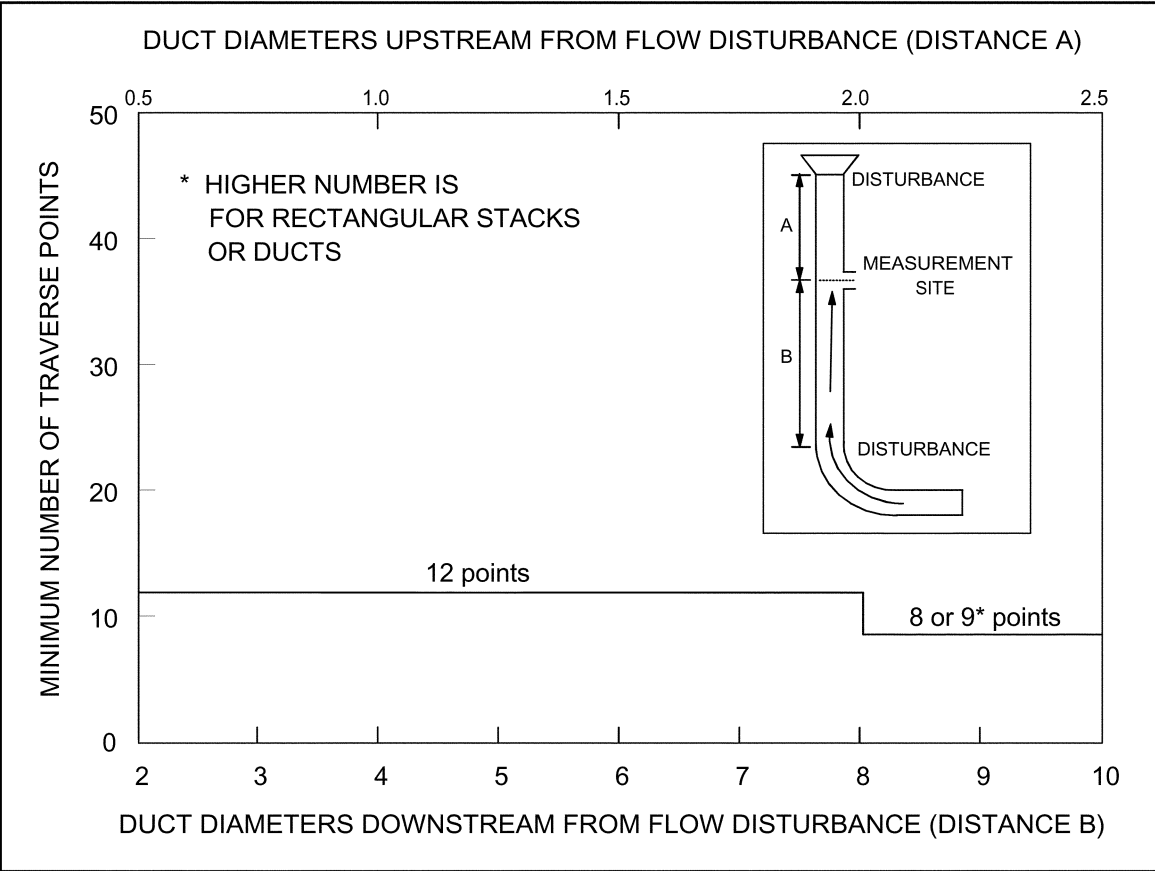


Figure 7. Minimum Number of Traverse Points for Preliminary Method 4 Traverse

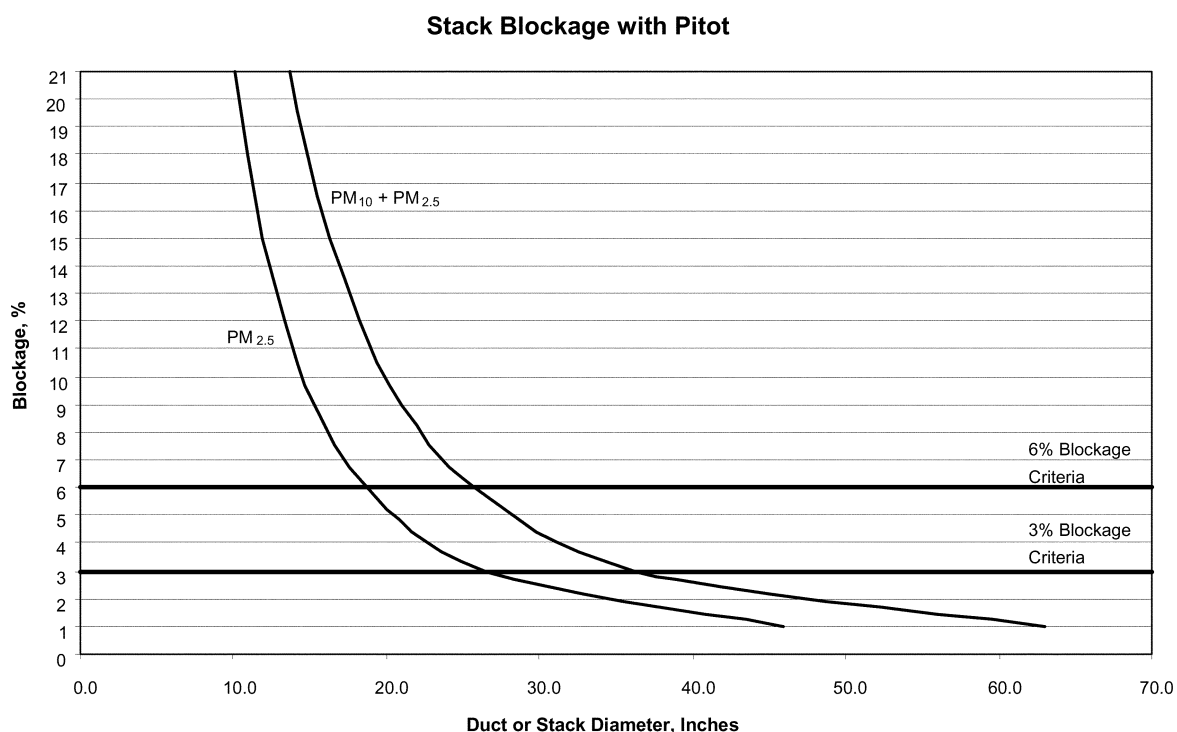


Figure 8. Gas Flow Blockage by the Sampling Heads with the Pitot Tube

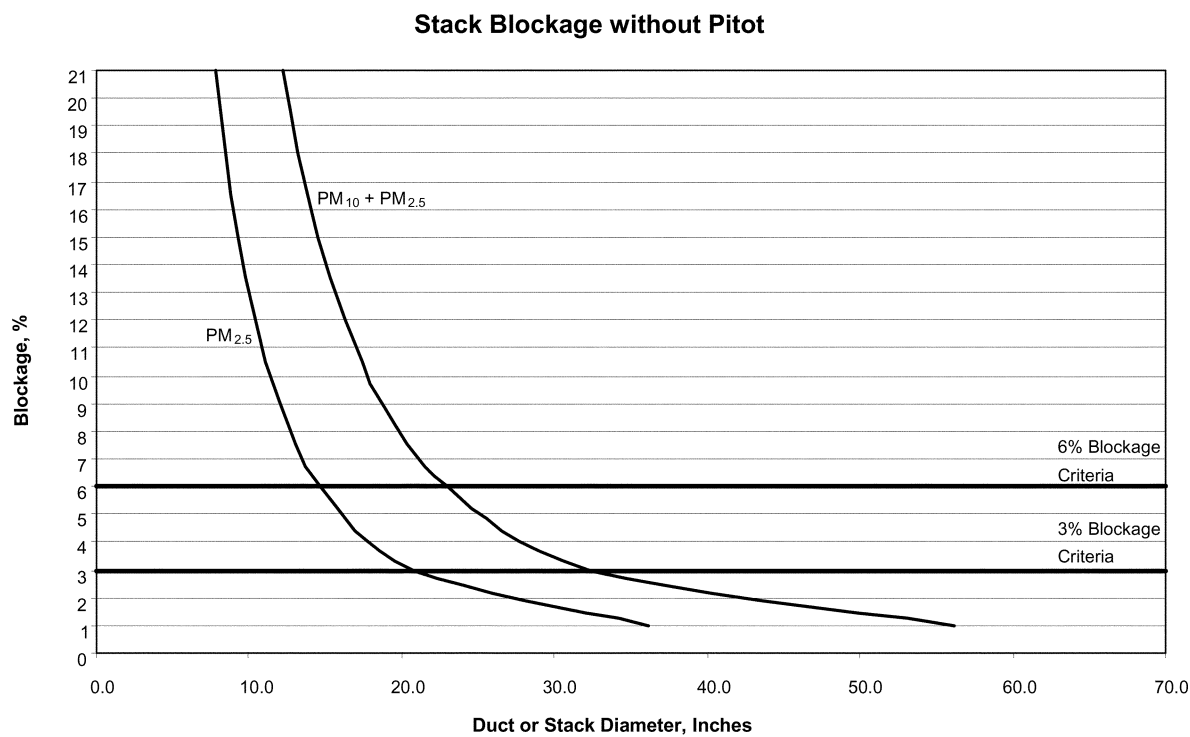


Figure 9. Gas Flow Blockage by the Sampling Heads without the Pitot Tube

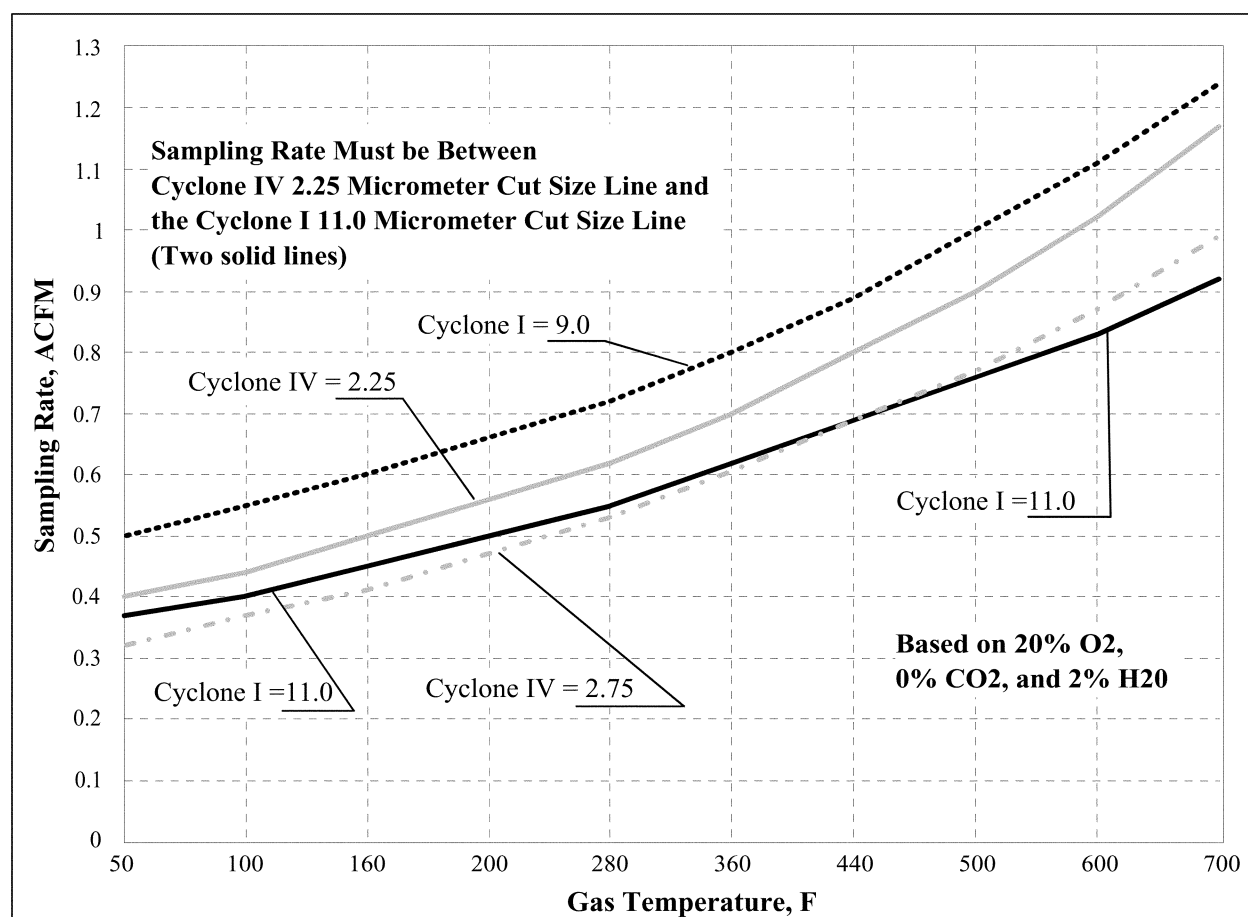


Figure 10. Acceptable Sampling Rate for Combined Cyclone Heads

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Method 202—Dry Impinger Method for Determining Condensable Particulate Emissions From Stationary Sources

1.0 Scope and Applicability

1.1 Scope. The U.S. Environmental Protection Agency (U.S. EPA or “we”) developed this method to describe the procedures that the stack tester (“you”) must follow to measure condensable particulate matter (CPM) emissions from stationary sources. This method includes procedures for measuring both organic and inorganic CPM.

1.2 Applicability. This method addresses the equipment, preparation, and analysis necessary to measure only CPM. You can use this method only for stationary source emission measurements. You can use this method to measure CPM from stationary source emissions after filterable particulate matter (PM) has been removed. CPM is measured in the emissions after removal from the stack and after passing through a filter.

(a) If the gas filtration temperature exceeds 30 °C (85 °F) and you must measure both the filterable and condensable (material that condenses after passing through a filter) components of total primary (direct) PM emissions to the atmosphere, then you must combine the procedures in this method with

the procedures in Method 201A of appendix M to this part for measuring filterable PM. However, if the gas filtration temperature never exceeds 30 °C (85 °F), then use of this method is not required to measure total primary PM.

(b) If Method 17 of appendix A-6 to part 60 is used in conjunction with this method and constant weight requirements for the in-stack filter cannot be met, the Method 17 filter and sampling nozzle rinse must be treated as described in Sections 8.5.4.4 and 11.2.1 of this method. (See Section 3.0 for a definition of constant weight.) Extracts resulting from the use of this procedure must be filtered to remove filter fragments before the filter is processed and weighed.

1.3 Responsibility. You are responsible for obtaining the equipment and supplies you will need to use this method. You should also develop your own procedures for following this method and any additional procedures to ensure accurate sampling and analytical measurements.

1.4 Additional Methods. To obtain reliable results, you should have a thorough knowledge of the following test methods that are found in appendices A-1 through A-3 and A-6 to part 60, and in appendix M to this part:

(a) Method 1—Sample and velocity traverses for stationary sources.

(b) Method 2—Determination of stack gas velocity and volumetric flow rate (Type S pitot tube).

(c) Method 3—Gas analysis for the determination of dry molecular weight.

(d) Method 4—Determination of moisture content in stack gases.

(e) Method 5—Determination of particulate matter emissions from stationary sources.

(f) Method 17—Determination of particulate matter emissions from stationary sources (in-stack filtration method).

(g) Method 201A—Determination of PM₁₀ and PM_{2.5} emissions from stationary sources (Constant sampling rate procedure).

(h) You will need additional test methods to measure filterable PM. You may use Method 5 (including Method 5A, 5D and 5I but not 5B, 5E, 5F, 5G, or 5H) of appendix A-3 to part 60, or Method 17 of appendix A-6 to part 60, or Method 201A of appendix M to this part to collect filterable PM from stationary sources with temperatures above 30 °C (85 °F) in conjunction with this method. However, if the gas filtration temperature never exceeds 30 °C (85 °F), then use of this method is not required to measure total primary PM.

1.5 **Limitations.** You can use this method to measure emissions in stacks that have entrained droplets only when this method is combined with a filterable PM test method that operates at high enough temperatures to cause water droplets sampled through the probe to become vaporous.

1.6 **Conditions.** You must maintain isokinetic sampling conditions to meet the requirements of the filterable PM test method used in conjunction with this method. You must sample at the required number of sampling points specified in Method 5 of appendix A–3 to part 60, Method 17 of appendix A–6 to part 60, or Method 201A of appendix M to this part. Also, if you are using this method as an alternative to a required performance test method, you must receive approval from the regulatory authority that established the requirement to use this test method prior to conducting the test.

2.0 Summary of Method

2.1 **Summary.** The CPM is collected in dry impingers after filterable PM has been collected on a filter maintained as specified in either Method 5 of appendix A–3 to part 60, Method 17 of appendix A–6 to part 60, or Method 201A of appendix M to this part. The organic and aqueous fractions of the impingers and an out-of-stack CPM filter are then taken to dryness and weighed. The total of the impinger fractions and the CPM filter represents the CPM. Compared to the version of Method 202 that was promulgated on December 17, 1991, this method eliminates the use of water as the collection media in impingers and includes the addition of a condenser followed by a water dropout impinger immediately after the final in-stack or heated filter. This method also includes the addition of one modified Greenburg Smith impinger (backup impinger) and a CPM filter following the water dropout impinger. Figure 1 of Section 18 presents the schematic of the sampling train configured with these changes.

2.1.1 **Condensable PM.** CPM is collected in the water dropout impinger, the modified Greenburg Smith impinger, and the CPM filter of the sampling train as described in this method. The impinger contents are purged with nitrogen immediately after sample collection to remove dissolved sulfur dioxide (SO₂) gases from the impinger. The CPM filter is extracted with water and hexane. The impinger solution is then extracted with hexane. The organic and aqueous fractions are dried and the residues are weighed. The total of the aqueous and organic fractions represents the CPM.

2.1.2 **Dry Impinger and Additional Filter.** The potential artifacts from SO₂ are reduced using a condenser and water dropout impinger to separate CPM from reactive gases. No water is added to the impingers prior to the start of sampling. To improve the collection efficiency of CPM, an additional filter (the “CPM filter”) is placed between the second and third impingers.

3.0 Definitions

3.1 **Condensable PM (CPM)** means material that is vapor phase at stack conditions, but condenses and/or reacts upon

cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. Note that all condensable PM is assumed to be in the PM_{2.5} size fraction.

3.2 **Constant weight** means a difference of no more than 0.5 mg or one percent of total weight less tare weight, whichever is greater, between two consecutive weighings, with no less than six hours of desiccation time between weighings.

3.3 **Field Train Proof Blank.** A field train proof blank is recovered on site from a clean, fully-assembled sampling train prior to conducting the first emissions test.

3.4 **Filterable PM** means particles that are emitted directly by a source as a solid or liquid at stack or release conditions and captured on the filter of a stack test train.

3.5 **Primary PM** (also known as direct PM) means particles that enter the atmosphere as a direct emission from a stack or an open source. Primary PM comprises two components: filterable PM and condensable PM. These two PM components have no upper particle size limit.

3.6 **Primary PM_{2.5}** (also known as direct PM_{2.5}, total PM_{2.5}, PM_{2.5}, or combined filterable PM_{2.5} and condensable PM) means PM with an aerodynamic diameter less than or equal to 2.5 micrometers. These solid particles are emitted directly from an air emissions source or activity, or are the gaseous emissions or liquid droplets from an air emissions source or activity that condense to form PM at ambient temperatures. Direct PM_{2.5} emissions include elemental carbon, directly emitted organic carbon, directly emitted sulfate, directly emitted nitrate, and other inorganic particles (including but not limited to crustal material, metals, and sea salt).

3.7 **Primary PM₁₀** (also known as direct PM₁₀, total PM₁₀, PM₁₀, or the combination of filterable PM₁₀ and condensable PM) means PM with an aerodynamic diameter equal to or less than 10 micrometers.

4.0 Interferences

[Reserved]

5.0 Safety

Disclaimer. Because the performance of this method may require the use of hazardous materials, operations, and equipment, you should develop a health and safety plan to ensure the safety of your employees who are on site conducting the particulate emission test. Your plan should conform with all applicable Occupational Safety and Health Administration, Mine Safety and Health Administration, and Department of Transportation regulatory requirements. Because of the unique situations at some facilities and because some facilities may have more stringent requirements than is required by State or federal laws, you may have to develop procedures to conform to the plant health and safety requirements.

6.0 Equipment and Supplies

The equipment used in the filterable particulate portion of the sampling train is described in Methods 5 and 17 of appendix A–1 through A–3 and A–6 to part 60 and Method 201A of appendix M to this part. The

equipment used in the CPM portion of the train is described in this section.

6.1 **Condensable Particulate Sampling Train Components.** The sampling train for this method is used in addition to filterable particulate collection using Method 5 of appendix A–3 to part 60, Method 17 of appendix A–6 to part 60, or Method 201A of appendix M to this part. This method includes the following exceptions or additions:

6.1.1 **Probe Extension and Liner.** The probe extension between the filterable particulate filter and the condenser must be glass- or fluoropolymer-lined. Follow the specifications for the probe liner specified in Section 6.1.1.2 of Method 5 of appendix A–3 to part 60.

6.1.2 **Condenser and Impingers.** You must add the following components to the filterable particulate sampling train: A Method 23 type condenser as described in Section 2.1.2 of Method 23 of appendix A–8 to part 60, followed by a water dropout impinger or flask, followed by a modified Greenburg-Smith impinger (backup impinger) with an open tube tip as described in Section 6.1.1.8 of Method 5 of appendix A–3 to part 60.

6.1.3 **CPM Filter Holder.** The modified Greenburg-Smith impinger is followed by a filter holder that is either glass, stainless steel (316 or equivalent), or fluoropolymer-coated stainless steel. Commercial size filter holders are available depending on project requirements. Use a commercial filter holder capable of supporting 47 mm or greater diameter filters. Commercial size filter holders contain a fluoropolymer O-ring, stainless steel, ceramic or fluoropolymer filter support and a final fluoropolymer O-ring. A filter that meets the requirements specified in Section 7.1.1 may be placed behind the CPM filter to reduce the pressure drop across the CPM filter. This support filter is not part of the PM sample and is not recovered with the CPM filter. At the exit of the CPM filter, install a fluoropolymer-coated or stainless steel encased thermocouple that is in contact with the gas stream.

6.1.4 **Long Stem Impinger Insert.** You will need a long stem modified Greenburg Smith impinger insert for the water dropout impinger to perform the nitrogen purge of the sampling train.

6.2 Sample Recovery Equipment.

6.2.1 **Condensable PM Recovery.** Use the following equipment to quantitatively determine the amount of CPM recovered from the sampling train.

(a) **Nitrogen purge line.** You must use inert tubing and fittings capable of delivering at least 14 liters/min of nitrogen gas to the impinger train from a standard gas cylinder (see Figures 2 and 3 of Section 18). You may use standard 0.6 centimeters (¼ inch) tubing and compression fittings in conjunction with an adjustable pressure regulator and needle valve.

(b) **Rotameter.** You must use a rotameter capable of measuring gas flow up to 20 L/min. The rotameter must be accurate to five percent of full scale.

(c) **Nitrogen gas purging system.** Compressed ultra-pure nitrogen, regulator, and filter must be capable of providing at

least 14 L/min purge gas for one hour through the sampling train.

(d) Amber glass bottles (500 ml).

6.2.2 Analysis Equipment. The following equipment is necessary for CPM sample analysis:

(a) Separatory Funnel. Glass, 1 liter.

(b) Weighing Tins. 50 ml. Glass evaporation vials, fluoropolymer beaker liners, or aluminum weighing tins can be used.

(c) Glass Beakers. 300 to 500 ml.

(d) Drying Equipment. A desiccator containing anhydrous calcium sulfate that is maintained below 10 percent relative humidity, and a hot plate or oven equipped with temperature control.

(e) Glass Pipets. 5 ml.

(f) Burette. Glass, 0 to 100 ml in 0.1 ml graduations.

(g) Analytical Balance. Analytical balance capable of weighing at least 0.0001 g (0.1 mg).

(h) pH Meter or Colorimetric pH Indicator. The pH meter or colorimetric pH indicator (e.g., phenolphthalein) must be capable of determining the acidity of liquid within 0.1 pH units.

(i) Sonication Device. The device must have a minimum sonication frequency of 20 kHz and be approximately four to six inches deep to accommodate the sample extractor tube.

(j) Leak-Proof Sample Containers. Containers used for sample and blank recovery must not contribute more than 0.05 mg of residual mass to the CPM measurements.

(k) Wash bottles. Any container material is acceptable, but wash bottles used for sample and blank recovery must not contribute more than 0.1 mg of residual mass to the CPM measurements.

7.0 Reagents and Standards

7.1 Sample Collection. To collect a sample, you will need a CPM filter, crushed ice, and silica gel. You must also have water and nitrogen gas to purge the sampling train. You will find additional information on each of these items in the following summaries.

7.1.1 CPM Filter. You must use a nonreactive, nondisintegrating polymer filter that does not have an organic binder and does not contribute more than 0.5 mg of residual mass to the CPM measurements. The CPM filter must also have an efficiency of at least 99.95 percent (less than 0.05 percent penetration) on 0.3 micrometer dioctyl phthalate particles. You may use test data from the supplier's quality control program to document the CPM filter efficiency.

7.1.2 Silica Gel. Use an indicating-type silica gel of six to 16 mesh. You must obtain approval of the Administrator for other types of desiccants (equivalent or better) before you use them. Allow the silica gel to dry for two hours at 175 °C (350 °F) if it is being reused. You do not have to dry new silica gel if the indicator shows the silica gel is active for moisture collection.

7.1.3 Water. Use deionized, ultra-filtered water that contains 1.0 parts per million by weight (ppmw) (1 mg/L) residual mass or less to recover and extract samples.

7.1.4 Crushed Ice. Obtain from the best readily available source.

7.1.5 Nitrogen Gas. Use Ultra-High Purity compressed nitrogen or equivalent to purge the sampling train. The compressed nitrogen you use to purge the sampling train must contain no more than 1 parts per million by volume (ppmv) oxygen, 1 ppmv total hydrocarbons as carbon, and 2 ppmv moisture. The compressed nitrogen must not contribute more than 0.1 mg of residual mass per purge.

7.2 Sample Recovery and Analytical Reagents. You will need acetone, hexane, anhydrous calcium sulfate, ammonia hydroxide, and deionized water for the sample recovery and analysis. Unless otherwise indicated, all reagents must conform to the specifications established by the Committee on Analytical Reagents of the American Chemical Society. If such specifications are not available, then use the best available grade. Additional information on each of these items is in the following paragraphs:

7.2.1 Acetone. Use acetone that is stored in a glass bottle. Do not use acetone from a metal container because it normally produces a high residual mass in the laboratory and field reagent blanks. You must use acetone that has a blank value less than 1.0 ppmw (0.1 mg/100 ml) residue.

7.2.2 Hexane, American Chemical Society grade. You must use hexane that has a blank residual mass value less than 1.0 ppmw (0.1 mg/100 ml) residue.

7.2.3 Water. Use deionized, ultra-filtered water that contains 1 ppmw (1 mg/L) residual mass or less to recover material caught in the impinger.

7.2.4 Condensable Particulate Sample Desiccant. Use indicating-type anhydrous calcium sulfate to desiccate water and organic extract residue samples prior to weighing.

7.2.5 Ammonium Hydroxide. Use National Institute of Standards and Technology-traceable or equivalent (0.1 N) NH₄OH.

7.2.6 Standard Buffer Solutions. Use one buffer solution with a neutral pH and a second buffer solution with an acid pH of no less than 4.

8.0 Sample Collection, Preservation, Storage, and Transport

8.1 Qualifications. This is a complex test method. To obtain reliable results, you should be trained and experienced with in-stack filtration systems (such as, cyclones, impactors, and thimbles) and impinger and moisture train systems.

8.2 Preparations. You must clean all glassware used to collect and analyze samples prior to field tests as described in Section 8.4 prior to use. Cleaned glassware must be used at the start of each new source category tested at a single facility. Analyze laboratory reagent blanks (water, acetone, and hexane) before field tests to verify low blank concentrations. Follow the pretest preparation instructions in Section 8.1 of Method 5.

8.3 Site Setup. You must follow the procedures required in Methods 5, 17, or 201A, whichever is applicable to your test requirements including:

(a) Determining the sampling site location and traverse points.

(b) Calculating probe/cyclone blockage (as appropriate).

(c) Verifying the absence of cyclonic flow.

(d) Completing a preliminary velocity profile, and selecting a nozzle(s) and sampling rate.

8.3.1 Sampling Site Location. Follow the standard procedures in Method 1 of appendix A-1 to part 60 to select the appropriate sampling site. Choose a location that maximizes the distance from upstream and downstream flow disturbances.

8.3.2 Traverse points. Use the required number of traverse points at any location, as found in Methods 5, 17, or 201A, whichever is applicable to your test requirements. You must prevent the disturbance and capture of any solids accumulated on the inner wall surfaces by maintaining a 1-inch distance from the stack wall (0.5 inch for sampling locations less than 24 inches in diameter).

8.4 Sampling Train Preparation. A schematic of the sampling train used in this method is shown in Figure 1 of Section 18. All glassware that is used to collect and analyze samples must be cleaned prior to the test with soap and water, and rinsed using tap water, deionized water, acetone, and finally, hexane. It is important to completely remove all silicone grease from areas that will be exposed to the hexane rinse during sample recovery. After cleaning, you must bake glassware at 300 °C for six hours prior to beginning tests at each source category sampled at a facility. As an alternative to baking glassware, a field train proof blank, as specified in Section 8.5.4.10, can be performed on the sampling train glassware that is used to collect CPM samples. Prior to each sampling run, the train glassware used to collect condensable PM must be rinsed thoroughly with deionized, ultra-filtered water that contains 1 ppmw (1 mg/L) residual mass or less.

8.4.1 Condenser and Water Dropout Impinger. Add a Method 23 type condenser and a condensate dropout impinger without bubbler tube after the final probe extension that connects the in-stack or out-of-stack hot filter assembly with the CPM sampling train. The Method 23 type stack gas condenser is described in Section 2.1.2 of Method 23. The condenser must be capable of cooling the stack gas to less than or equal to 30 °C (85 °F).

8.4.2 Backup Impinger. The water dropout impinger is followed by a modified Greenburg Smith impinger (backup impinger) with no taper (see Figure 1 of Section 18). Place the water dropout and backup impingers in an insulated box with water at less than or equal to 30 °C (less than or equal to 85 °F). At the start of the tests, the water dropout and backup impingers must be clean, without any water or reagent added.

8.4.3 CPM Filter. Place a filter holder with a filter meeting the requirements in Section 7.1.1 after the backup impinger. The connection between the CPM filter and the moisture trap impinger must include a thermocouple fitting that provides a leak-free seal between the thermocouple and the stack gas. (**Note:** A thermocouple well is not sufficient for this purpose because the fluoropolymer- or steel-encased thermocouple must be in contact with the sample gas.)

8.4.4 **Moisture Traps.** You must use a modified Greenburg-Smith impinger containing 100 ml of water, or the alternative described in Method 5 of appendix A-3 to part 60, followed by an impinger containing silica gel to collect moisture that passes through the CPM filter. You must maintain the gas temperature below 20 °C (68 °F) at the exit of the moisture traps.

8.4.5 **Silica Gel Trap.** Place 200 to 300 g of silica gel in each of several air-tight containers. Weigh each container, including silica gel, to the nearest 0.5 g, and record this weight on the filterable particulate data sheet. As an alternative, the silica gel need not be preweighed, but may be weighed directly in its impinger or sampling holder just prior to train assembly.

8.4.6 **Leak-Check (Pretest).** Use the procedures outlined in Method 5 of appendix A-3 to part 60, Method 17 of appendix A-6 to part 60, or Method 201A of appendix M to this part as appropriate to leak check the entire sampling system. Specifically, perform the following procedures:

8.4.6.1 **Sampling train.** You must pretest the entire sampling train for leaks. The pretest leak-check must have a leak rate of not more than 0.02 actual cubic feet per minute or 4 percent of the average sample flow during the test run, whichever is less. Additionally, you must conduct the leak-check at a vacuum equal to or greater than the vacuum anticipated during the test run. Enter the leak-check results on the field test data sheet for the filterable particulate method. (**Note:** Conduct leak-checks during port changes only as allowed by the filterable particulate method used with this method.)

8.4.6.2 **Pitot tube assembly.** After you leak-check the sample train, perform a leak-check of the pitot tube assembly. Follow the procedures outlined in Section 8.4.1 of Method 5.

8.5 **Sampling Train Operation.** Operate the sampling train as described in the filterable particulate sampling method (*i.e.*, Method 5 of appendix A-3 to part 60, Method 17 of appendix A-6 to part 60, or Method 201A of appendix M to this part) with the following additions or exceptions:

8.5.1 **CPM Filter Assembly.** On the field data sheet for the filterable particulate method, record the CPM filter temperature readings at the beginning of each sample time increment and when sampling is halted. Maintain the CPM filter greater than 20 °C (greater than 65 °F) but less than or equal to 30 °C (less than or equal to 85 °F) during sample collection. (**Note:** Maintain the temperature of the CPM filter assembly as close to 30 °C (85 °F) as feasible.)

8.5.2 **Leak-Check Probe/Sample Train Assembly (Post-Test).** Conduct the leak rate check according to the filterable particulate sampling method used during sampling. If required, conduct the leak-check at a vacuum equal to or greater than the maximum vacuum achieved during the test run. If the leak rate of the sampling train exceeds 0.02 actual cubic feet per minute or four percent of the average sampling rate during the test run (whichever is less), then the run is invalid and you must repeat it.

8.5.3 **Post-Test Nitrogen Purge.** As soon as possible after the post-test leak-check,

detach the probe, any cyclones, and in-stack or hot filters from the condenser and impinger train. If no water was collected before the CPM filter, then you may skip the remaining purge steps and proceed with sample recovery (see Section 8.5.4). You may purge the CPM sampling train using the sampling system meter box and vacuum pump or by passing nitrogen through the train under pressure. For either type of purge, you must first attach the nitrogen supply line to a purged inline filter.

8.5.3.1 If you choose to conduct a pressurized nitrogen purge on the complete CPM sampling train, you must quantitatively transfer the water collected in the condenser and the water dropout impinger to the backup impinger. You must measure the water combined in the backup impinger and record the volume or weight as part of the moisture collected during sampling as specified in Section 8.5.3.4.

(a) You must conduct the purge on the condenser, backup impinger, and CPM filter. If the tip of the backup impinger insert does not extend below the water level (including the water transferred from the first impinger), you must add a measured amount of degassed, deionized ultra-filtered water that contains 1 ppmw (1 mg/L) residual mass or less until the impinger tip is at least 1 centimeter below the surface of the water. You must record the amount of water added to the water dropout impinger (V_p) (see Figure 4 of Section 18) to correct the moisture content of the effluent gas. (**Note:** Prior to use, water must be degassed using a nitrogen purge bubbled through the water for at least 15 minutes to remove dissolved oxygen.)

(b) To perform the nitrogen purge using positive pressure nitrogen flow, you must start with no flow of gas through the clean purge line and fittings. Connect the filter outlet to the input of the impinger train and disconnect the vacuum line from the exit of the silica moisture collection impinger (see Figure 3 of Section 18). You may purge only the CPM train by disconnecting the moisture train components if you measure moisture in the field prior to the nitrogen purge. You must increase the nitrogen flow gradually to avoid over-pressurizing the impinger array. You must purge the CPM train at a minimum of 14 liters per minute for at least one hour. At the conclusion of the purge, turn off the nitrogen delivery system.

8.5.3.2 If you choose to conduct a nitrogen purge on the complete CPM sampling train using the sampling system meter box and vacuum pump, replace the short stem impinger insert with a modified Greenberg Smith impinger insert. The impinger tip length must extend below the water level in the impinger catch.

(a) You must conduct the purge on the complete CPM sampling train starting at the inlet of the condenser. If insufficient water was collected, you must add a measured amount of degassed, deionized ultra-filtered water that contains 1 ppmw (1 mg/L) residual mass or less until the impinger tip is at least 1 centimeter below the surface of the water. You must record the amount of water added to the water dropout impinger (V_p) (see Figure 4 of Section 18) to correct the

moisture content of the effluent gas. (**Note:** Prior to use, water must be degassed using a nitrogen purge bubbled through the water for at least 15 minutes to remove dissolved oxygen).

(b) You must start the purge using the sampling train vacuum pump with no flow of gas through the clean purge line and fittings. Connect the filter outlet to the input of the impinger train (see Figure 2 of Section 18). To avoid over- or under-pressurizing the impinger array, slowly commence the nitrogen gas flow through the line while simultaneously opening the meter box pump valve(s). Adjust the pump bypass and/or nitrogen delivery rates to obtain the following conditions: 14 liters/min or $\Delta H@$ and a positive overflow rate through the rotameter of less than 2 liters/min. The presence of a positive overflow rate guarantees that the nitrogen delivery system is operating at greater than ambient pressure and prevents the possibility of passing ambient air (rather than nitrogen) through the impingers. Continue the purge under these conditions for at least one hour, checking the rotameter and $\Delta H@$ value(s) at least every 15 minutes. At the conclusion of the purge, simultaneously turn off the delivery and pumping systems.

8.5.3.3 During either purge procedure, continue operation of the condenser recirculation pump, and heat or cool the water surrounding the first two impingers to maintain the gas temperature measured at the exit of the CPM filter greater than 20 °C (greater than 65 °F), but less than or equal to 30 °C (less than or equal to 85 °F). If the volume of liquid collected in the moisture traps has not been determined prior to conducting the nitrogen purge, maintain the temperature of the moisture traps following the CPM filter to prevent removal of moisture during the purge. If necessary, add more ice during the purge to maintain the gas temperature measured at the exit of the silica gel impinger below 20 °C (68 °F). Continue the purge under these conditions for at least one hour, checking the rotameter and $\Delta H@$ value(s) periodically. At the conclusion of the purge, simultaneously turn off the delivery and pumping systems.

8.5.3.4 Weigh the liquid, or measure the volume of the liquid collected in the dropout, impingers, and silica trap if this has not been done prior to purging the sampling train. Measure the liquid in the water dropout impinger to within 1 ml using a clean graduated cylinder or by weighing it to within 0.5 g using a balance. Record the volume or weight of liquid present to be used to calculate the moisture content of the effluent gas in the field log notebook.

8.5.3.5 If a balance is available in the field, weigh the silica impinger to within 0.5 g. Note the color of the indicating silica gel in the last impinger to determine whether it has been completely spent, and make a notation of its condition in the field log notebook.

8.5.4 **Sample Recovery.**

8.5.4.1 **Recovery of filterable PM.** Recovery of filterable PM involves the quantitative transfer of particles according to the filterable particulate sampling method (*i.e.*, Method 5 of appendix A-3 to part 60,

Method 17 of appendix A–6 to part 60, or Method 201A of appendix M to this part).

8.5.4.2 *CPM Container #1, Aqueous liquid impinger contents.* Quantitatively transfer liquid from the dropout and the backup impingers prior to the CPM filter into a clean, leak-proof container labeled with test identification and “CPM Container #1, Aqueous Liquid Impinger Contents.” Rinse all sampling train components including the back half of the filterable PM filter holder, the probe extension, condenser, each impinger and the connecting glassware, and the front half of the CPM filter housing twice with water. Recover the rinse water, and add it to CPM Container #1. Mark the liquid level on the container.

8.5.4.3 *CPM Container #2, Organic rinses.* Follow the water rinses of the probe extension, condenser, each impinger and all of the connecting glassware and front half of the CPM filter with an acetone rinse. Recover the acetone rinse into a clean, leak-proof container labeled with test identification and “CPM Container #2, Organic Rinses.” Then repeat the entire rinse procedure with two rinses of hexane, and save the hexane rinses in the same container as the acetone rinse (CPM Container #2). Mark the liquid level on the jar.

8.5.4.4 *CPM Container #3, CPM filter sample.* Use tweezers and/or clean disposable surgical gloves to remove the filter from the CPM filter holder. Place the filter in the Petri dish labeled with test identification and “CPM Container #3, Filter Sample.”

8.5.4.5 *CPM Container #4, Cold impinger water.* You must weigh or measure the volume of the contents of CPM Container #4 either in the field or during sample analysis (see Section 11.2.4). If the water from the cold impinger has been weighed in the field, it can be discarded. Otherwise, quantitatively transfer liquid from the cold impinger that follows the CPM filter into a clean, leak-proof container labeled with test identification and “CPM Container #4, Cold Water Impinger.” Mark the liquid level on the container. CPM Container #4 holds the remainder of the liquid water from the emission gases.

8.5.4.6 *CPM Container #5, Silica gel absorbent.* You must weigh the contents of CPM Container #5 in the field or during sample analysis (see Section 11.2.5). If the silica gel has been weighed in the field to measure water content, then it can be discarded or recovered for reuse. Otherwise, transfer the silica gel to its original container labeled with test identification and “CPM Container #5, Silica Gel Absorbent” and seal. You may use a funnel to make it easier to pour the silica gel without spilling. You may also use a rubber policeman as an aid in removing the silica gel from the impinger. It is not necessary to remove the small amount of silica gel dust particles that may adhere to the impinger wall and are difficult to remove. Since the gain in weight is to be used for moisture calculations, do not use any water or other liquids to transfer the silica gel.

8.5.4.7 *CPM Container #6, Acetone field reagent blank.* Take approximately 200 ml of the acetone directly from the wash bottle you used for sample recovery and place it in a clean, leak-proof container labeled with test identification and “CPM Container #6,

Acetone Field Reagent Blank” (see Section 11.2.6 for analysis). Mark the liquid level on the container. Collect one acetone field reagent blank from the lot(s) of solvent used for the test.

8.5.4.8 *CPM Container #7, Water field reagent blank.* Take approximately 200 ml of the water directly from the wash bottle you used for sample recovery and place it in a clean, leak-proof container labeled with test identification and “CPM Container #7, Water Field Reagent Blank” (see Section 11.2.7 for analysis). Mark the liquid level on the container. Collect one water field reagent blank from the lot(s) of water used for the test.

8.5.4.9 *CPM Container #8, Hexane field reagent blank.* Take approximately 200 ml of the hexane directly from the wash bottle you used for sample recovery and place it in a clean, leak-proof container labeled with test identification and “CPM Container #8, Hexane Field Reagent Blank” (see Section 11.2.8 for analysis). Mark the liquid level on the container. Collect one hexane field reagent blank from the lot(s) of solvent used for the test.

8.5.4.10 *Field train proof blank.* If you did not bake the sampling train glassware as specified in Section 8.4, you must conduct a field train proof blank as specified in Sections 8.5.4.11 and 8.5.4.12 to demonstrate the cleanliness of sampling train glassware.

8.5.4.11 *CPM Container #9, Field train proof blank, inorganic rinses.* Prior to conducting the emission test, rinse the probe extension, condenser, each impinger and the connecting glassware, and the front half of the CPM filter housing twice with water. Recover the rinse water and place it in a clean, leak-proof container labeled with test identification and “CPM Container #9, Field Train Proof Blank, Inorganic Rinses.” Mark the liquid level on the container.

8.5.4.12 *CPM Container #10, Field train proof blank, organic rinses.* Follow the water rinse of the probe extension, condenser, each impinger and the connecting glassware, and the front half of the CPM filter housing with an acetone rinse. Recover the acetone rinse into a clean, leak-proof container labeled with test identification and “CPM Container #10, Field Train Proof Blank, Organic Rinses.” Then repeat the entire rinse procedure with two rinses of hexane and save the hexane rinses in the same container as the acetone rinse (CPM Container #10). Mark the liquid level on the container.

8.5.5 Transport procedures. Containers must remain in an upright position at all times during shipping. You do not have to ship the containers under dry or blue ice. However, samples must be maintained at or below 30 °C (85 °F) during shipping.

9.0 Quality Control

9.1 Daily Quality Checks. You must perform daily quality checks of field log notebooks and data entries and calculations using data quality indicators from this method and your site-specific test plan. You must review and evaluate recorded and transferred raw data, calculations, and documentation of testing procedures. You must initial or sign log notebook pages and data entry forms that were reviewed.

9.2 Calculation Verification. Verify the calculations by independent, manual checks. You must flag any suspect data and identify the nature of the problem and potential effect on data quality. After you complete the test, prepare a data summary and compile all the calculations and raw data sheets.

9.3 Conditions. You must document data and information on the process unit tested, the particulate control system used to control emissions, any non-particulate control system that may affect particulate emissions, the sampling train conditions, and weather conditions. Discontinue the test if the operating conditions may cause non-representative particulate emissions.

9.4 Field Analytical Balance Calibration Check. Perform calibration check procedures on field analytical balances each day that they are used. You must use National Institute of Standards and Technology (NIST)-traceable weights at a mass approximately equal to the weight of the sample plus container you will weigh.

9.5 Glassware. Use class A volumetric glassware for titrations, or calibrate your equipment against NIST-traceable glassware.

9.6 Laboratory Analytical Balance Calibration Check. Check the calibration of your laboratory analytical balance each day that you weigh CPM samples. You must use NIST Class S weights at a mass approximately equal to the weight of the sample plus container you will weigh.

9.7 Laboratory Reagent Blanks. You should run blanks of water, acetone, and hexane used for field recovery and sample analysis. Analyze at least one sample (150 ml minimum) of each lot of reagents that you plan to use for sample recovery and analysis before you begin testing. These blanks are not required by the test method, but running blanks before field use is advisable to verify low blank concentrations, thereby reducing the potential for a high field blank on test samples.

9.8 Field Reagent Blanks. You should run at least one field reagent blank of water, acetone, and hexane you use for field recovery. These blanks are not required by the test method, but running independent field reagent blanks is advisable to verify that low blank concentrations were maintained during field solvent use and demonstrate that reagents have not been contaminated during field tests.

9.9 Field Train Proof Blank. If you are not baking glassware as specified in Section 8.4, you must recover a minimum of one field train proof blank for the sampling train used for testing each new source category at a single facility. You must assemble the sampling train as it will be used for testing. You must recover the field train proof blank samples as described in Section 8.5.4.11 and 8.5.4.12.

9.10 Field Train Recovery Blank. You must recover a minimum of one field train blank for each source category tested at the facility. You must recover the field train blank after the first or second run of the test. You must assemble the sampling train as it will be used for testing. Prior to the purge, you must add 100 ml of water to the first impinger and record this data on Figure 4. You must purge the assembled train as

described in Sections 8.5.3.2 and 8.5.3.3. You must recover field train blank samples as described in Section 8.5.4. From the field sample weight, you will subtract the condensable particulate mass you determine with this blank train or 0.002 g (2.0 mg), whichever is less.

10.0 Calibration and Standardization

Maintain a field log notebook of all condensable particulate sampling and analysis calibrations. Include copies of the relevant portions of the calibration and field logs in the final test report.

10.1 Thermocouple Calibration. You must calibrate the thermocouples using the procedures described in Section 10.3.1 of Method 2 of appendix A–1 to part 60 or Alternative Method 2, Thermocouple Calibration (ALT–011) (<http://www.epa.gov/ttn/emc>). Calibrate each temperature sensor at a minimum of three points over the anticipated range of use against a NIST-traceable thermometer. Alternatively, a reference thermocouple and potentiometer calibrated against NIST standards can be used.

10.2 Ammonium Hydroxide. The 0.1 N NH_4OH used for titrations in this method is made as follows: Add 7 ml of concentrated (14.8 M) NH_4OH to 1 liter of water. Standardize against standardized 0.1 N H_2SO_4 , and calculate the exact normality using a procedure parallel to that described in Section 10.5 of Method 6 of appendix A–4 to 40 CFR part 60. Alternatively, purchase 0.1 N NH_4OH that has been standardized against a NIST reference material. Record the normality on the CPM Work Table (see Figure 6 of Section 18).

11.0 Analytical Procedures

11.1 Analytical Data Sheets. (a) Record the filterable particulate field data on the appropriate (i.e., Method 5, 17, or 201A) analytical data sheets. Alternatively, data may be recorded electronically using software applications such as the Electronic Reporting Tool available at http://www.epa.gov/ttn/chief/ert/ert_tool.html. Record the condensable particulate data on the CPM Work Table (see Figure 6 of Section 18).

(b) Measure the liquid in all containers either volumetrically to ± 1 ml or gravimetrically to ± 0.5 g. Confirm on the filterable particulate analytical data sheet whether leakage occurred during transport. If a noticeable amount of leakage has occurred, either void the sample or use methods (subject to the approval of the Administrator) to correct the final results.

11.2 Condensable PM Analysis. See the flow chart in Figure 7 of Section 18 for the steps to process and combine fractions from the CPM train.

11.2.1 Container #3, CPM Filter Sample. If the sample was collected by Method 17 or Method 201A with a stack temperature below 30 °C (85 °F) and the filter can be brought to a constant weight, transfer the filter and any loose PM from the sample container to a tared glass weighing dish. (See Section 3.0 for a definition of constant weight.) Desiccate the sample for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh

to a constant weigh and report the results to the nearest 0.1 mg. If the filter cannot be brought to constant weight using this procedure, you must follow the extraction and weighing procedures in this section. (See Section 3.0 for a definition of constant weight.) Extract the filter recovered from the low-temperature portion of the train, and combine the extracts with the organic and inorganic fractions resulting from the aqueous impinger sample recovery in Containers 1 and 2, respectively. Extract the CPM filter as follows:

11.2.1.1 Extract the water soluble (aqueous or inorganic) CPM from the CPM filter by folding the filter in quarters and placing it into a 50-ml extraction tube. Add sufficient deionized, ultra-filtered water to cover the filter (e.g., 10 ml of water). Place the extractor tube into a sonication bath and extract the water-soluble material for a minimum of two minutes. Combine the aqueous extract with the contents of Container #1. Repeat this extraction step twice for a total of three extractions.

11.2.1.2 Extract the organic soluble CPM from the CPM filter by adding sufficient hexane to cover the filter (e.g., 10 ml of hexane). Place the extractor tube into a sonication bath and extract the organic soluble material for a minimum of two minutes. Combine the organic extract with the contents of Container #2. Repeat this extraction step twice for a total of three extractions.

11.2.2 CPM Container #1, Aqueous Liquid Impinger Contents. Analyze the water soluble CPM in Container 1 as described in this section. Place the contents of Container #1 into a separatory funnel. Add approximately 30 ml of hexane to the funnel, mix well, and drain off the lower organic phase. Repeat this procedure twice with 30 ml of hexane each time combining the organic phase from each extraction. Each time, leave a small amount of the organic/hexane phase in the separatory funnel, ensuring that no water is collected in the organic phase. This extraction should yield about 90 ml of organic extract. Combine the organic extract from Container #1 with the organic train rinse in Container 2.

11.2.2.1 Determine the inorganic fraction weight. Transfer the aqueous fraction from the extraction to a clean 500-ml or smaller beaker. Evaporate to no less than 10 ml liquid on a hot plate or in the oven at 105 °C and allow to dry at room temperature (not to exceed 30 °C (85 °F)). You must ensure that water and volatile acids have completely evaporated before neutralizing nonvolatile acids in the sample. Following evaporation, desiccate the residue for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh at intervals of at least six hours to a constant weight. (See Section 3.0 for a definition of Constant weight.) Report results to the nearest 0.1 mg on the CPM Work Table (see Figure 6 of Section 18) and proceed directly to Section 11.2.3. If the residue can not be weighed to constant weight, redissolve the residue in 100 ml of deionized distilled ultra-filtered water that contains 1 ppmw (1 mg/L) residual mass or less and continue to Section 11.2.2.2.

11.2.2.2 Use titration to neutralize acid in the sample and remove water of hydration.

If used, calibrate the pH meter with the neutral and acid buffer solutions. Then titrate the sample with 0.1N NH_4OH to a pH of 7.0, as indicated by the pH meter or colorimetric indicator. Record the volume of titrant used on the CPM Work Table (see Figure 6 of Section 18).

11.2.2.3 Using a hot plate or an oven at 105 °C, evaporate the aqueous phase to approximately 10 ml. Quantitatively transfer the beaker contents to a clean, 50-ml pre-tared weighing tin and evaporate to dryness at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood. Following evaporation, desiccate the residue for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh at intervals of at least six hours to a constant weight. (See Section 3.0 for a definition of Constant weight.) Report results to the nearest 0.1 mg on the CPM Work Table (see Figure 6 of Section 18).

11.2.2.4 Calculate the correction factor to subtract the NH_4^+ retained in the sample using Equation 1 in Section 12.

11.2.3 CPM Container #2, Organic Fraction Weight Determination. Analyze the organic soluble CPM in Container #2 as described in this section. Place the organic phase in a clean glass beaker. Evaporate the organic extract at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood to not less than 10 ml. Quantitatively transfer the beaker contents to a clean 50-ml pre-tared weighing tin and evaporate to dryness at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood. Following evaporation, desiccate the organic fraction for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh at intervals of at least six hours to a constant weight (i.e., less than or equal to 0.5 mg change from previous weighing), and report results to the nearest 0.1 mg on the CPM Work Table (see Figure 6 of Section 18).

11.2.4 CPM Container #4, Cold Impinger Water. If the amount of water has not been determined in the field, note the level of liquid in the container, and confirm on the filterable particulate analytical data sheet whether leakage occurred during transport. If a noticeable amount of leakage has occurred, either void the sample or use methods (subject to the approval of the Administrator) to correct the final results. Measure the liquid in Container #4 either volumetrically to ± 1 ml or gravimetrically to ± 0.5 g, and record the volume or weight on the filterable particulate analytical data sheet of the filterable PM test method.

11.2.5 CPM Container #5, Silica Gel Absorbent. Weigh the spent silica gel (or silica gel plus impinger) to the nearest 0.5 g using a balance. This step may be conducted in the field. Record the weight on the filterable particulate analytical data sheet of the filterable PM test method.

11.2.6 Container #6, Acetone Field Reagent Blank. Use 150 ml of acetone from the blank container used for this analysis. Transfer 150 ml of the acetone to a clean 250-ml beaker. Evaporate the acetone at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood to approximately 10 ml. Quantitatively transfer

the beaker contents to a clean 50-ml pre-tared weighing tin, and evaporate to dryness at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood. Following evaporation, desiccate the residue for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh at intervals of at least six hours to a constant weight (i.e., less than or equal to 0.5 mg change from previous weighing), and report results to the nearest 0.1 mg on Figure 4 of Section 19.

11.2.7 Water Field Reagent Blank, Container #7. Use 150 ml of the water from the blank container for this analysis. Transfer the water to a clean 250-ml beaker, and evaporate to approximately 10 ml liquid in the oven at 105 °C. Quantitatively transfer the beaker contents to a clean 50 ml pre-tared weighing tin and evaporate to dryness at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood. Following evaporation, desiccate the residue for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh at intervals of at least six hours to a constant weight (i.e., less than or equal to 0.5 mg change from previous weighing) and report results to the nearest 0.1 mg on Figure 4 of Section 18.

11.2.8 Hexane Field Reagent Blank, Container #8. Use 150 ml of hexane from the blank container for this analysis. Transfer 150 ml of the hexane to a clean 250-ml beaker. Evaporate the hexane at room temperature (not to exceed 30 °C (85 °F)) and

pressure in a laboratory hood to approximately 10 ml. Quantitatively transfer the beaker contents to a clean 50-ml pre-tared weighing tin and evaporate to dryness at room temperature (not to exceed 30 °C (85 °F)) and pressure in a laboratory hood. Following evaporation, desiccate the residue for 24 hours in a desiccator containing anhydrous calcium sulfate. Weigh at intervals of at least six hours to a constant weight (i.e., less than or equal to 0.5 mg change from previous weighing), and report results to the nearest 0.1 mg on Figure 4 of Section 18.

12.0 Calculations and Data Analysis

12.1 Nomenclature. Report results in International System of Units (SI units) unless the regulatory authority for testing specifies English units. The following nomenclature is used.

ΔH_{or} = Pressure drop across orifice at flow rate of 0.75 SCFM at standard conditions, inches of water column (**Note:** Specific to each orifice and meter box).

17.03 = mg/milliequivalents for ammonium ion.

ACFM = Actual cubic feet per minute.

C_{cpm} = Concentration of the condensable PM in the stack gas, dry basis, corrected to standard conditions, milligrams/dry standard cubic foot.

m_c = Mass of the NH_4^+ added to sample to form ammonium sulfate, mg.

m_{cpm} = Mass of the total condensable PM, mg.

m_{fb} = Mass of total CPM in field train recovery blank, mg.

mg = Milligrams.

mg/L = Milligrams per liter.

m_i = Mass of inorganic CPM, mg.

m_{ib} = Mass of inorganic CPM in field train recovery blank, mg.

m_o = Mass of organic CPM, mg.

m_{ob} = Mass of organic CPM in field train blank, mg.

m_r = Mass of dried sample from inorganic fraction, mg.

N = Normality of ammonium hydroxide titrant.

ppmv = Parts per million by volume.

ppmw = Parts per million by weight.

$V_{\text{m(std)}}$ = Volume of gas sample measured by the dry gas meter, corrected to standard conditions, dry standard cubic meter (dscm) or dry standard cubic foot (dscf) as defined in Equation 5–1 of Method 5.

V_t = Volume of NH_4OH titrant, ml.

V_p = Volume of water added during train purge.

12.2 Calculations. Use the following equations to complete the calculations required in this test method. Enter the appropriate results from these calculations on the CPM Work Table (see Figure 6 of Section 18).

12.2.1 Mass of ammonia correction. Correction for ammonia added during titration of 100 ml aqueous CPM sample. This calculation assumes no waters of hydration.

$$m_c = 17.03 \times V_t \times N \quad (\text{Eq. 1})$$

12.2.2 Mass of the Field Train Recovery Blank (mg). Per Section 9.10, the mass of the

field train recovery blank, m_{fb} , shall not exceed 2.0 mg.

$$m_{\text{fb}} = m_{\text{ib}} + m_{\text{ob}} \quad (\text{Eq. 2})$$

12.2.3 Mass of Inorganic CPM (mg).

$$m_i = m_r - m_c \quad (\text{Eq. 3})$$

12.2.4 Total Mass of CPM (mg).

$$m_{\text{cpm}} = m_i + m_o - m_{\text{fb}} \quad (\text{Eq. 4})$$

12.2.5 Concentration of CPM (mg/dscf).

$$C_{\text{cpm}} = \frac{m_{\text{cpm}}}{V_{\text{m(std)}}} \quad (\text{Eq. 5})$$

12.3 Emissions Test Report. You must prepare a test report following the guidance in EPA Guidance Document 043 (Preparation and Review of Test Reports. December 1998).

13.0 Method Performance

An EPA field evaluation of the revised Method 202 showed the following precision in the results: approximately 4 mg for total CPM, approximately 0.5 mg for organic CPM, and approximately 3.5 mg for inorganic CPM.

14.0 Pollution Prevention

[Reserved]

15.0 Waste Management

Solvent and water are evaporated in a laboratory hood during analysis. No liquid waste is generated in the performance of this method. Organic solvents used to clean sampling equipment should be managed as RCRA organic waste.

16.0 Alternative Procedures

Alternative Method 2, Thermocouple Calibration (ALT-011) for the thermocouple calibration can be found at <http://www.epa.gov/ttn/emc/approalt.html>.

17.0 References

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- (2) DeWees, W.D. and K.C. Steinsberger. 1989. "Method Development and Evaluation

of Draft Protocol for Measurement of Condensable Particulate Emissions." Draft Report. November 17, 1989.

(3) DeWees, W.D., K.C. Steinsberger, G.M. Plummer, L.T. Lay, G.D. McAlister, and R.T. Shigehara. 1989. "Laboratory and Field Evaluation of EPA Method 5 Impinger Catch for Measuring Condensable Matter from Stationary Sources." Paper presented at the 1989 EPA/AWMA International Symposium on Measurement of Toxic and Related Air Pollutants. Raleigh, North Carolina. May 1-5, 1989.

(4) Electric Power Research Institute (EPRI). 2008. "Laboratory Comparison of Methods to Sample and Analyze Condensable PM." EPRI Agreement EP-P24373/C11811 Condensable Particulate Methods: EPRI Collaboration with EPA, October 2008.

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(8) Puget Sound Air Pollution Control Agency, Engineering Division. 1983.

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(9) U.S. Environmental Protection Agency, Federal Reference Methods 1 through 5 and Method 17, 40 CFR 60, appendix A-1 through A-3 and A-6.

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(11) U.S. Environmental Protection Agency. 2005. "Laboratory Evaluation of Method 202 to Determine Fate of SO₂ in Impinger Water," EPA Contract No. 68-D-02-061, Work Assignment 3-14, September 30, 2005.

(12) U.S. Environmental Protection Agency. 2010. Field valuation of an Improved Method for Sampling and Analysis of Filterable and Condensable Particulate Matter. Office of Air Quality Planning and Standards, Sector Policy and Program Division Monitoring Policy Group. Research Triangle Park, NC 27711.

(13) Wisconsin Department of Natural Resources. 1988. Air Management Operations Handbook, Revision 3. January 11, 1988.

18.0 Tables, Diagrams, Flowcharts, and Validation Data

BILLING CODE 6560-50-P

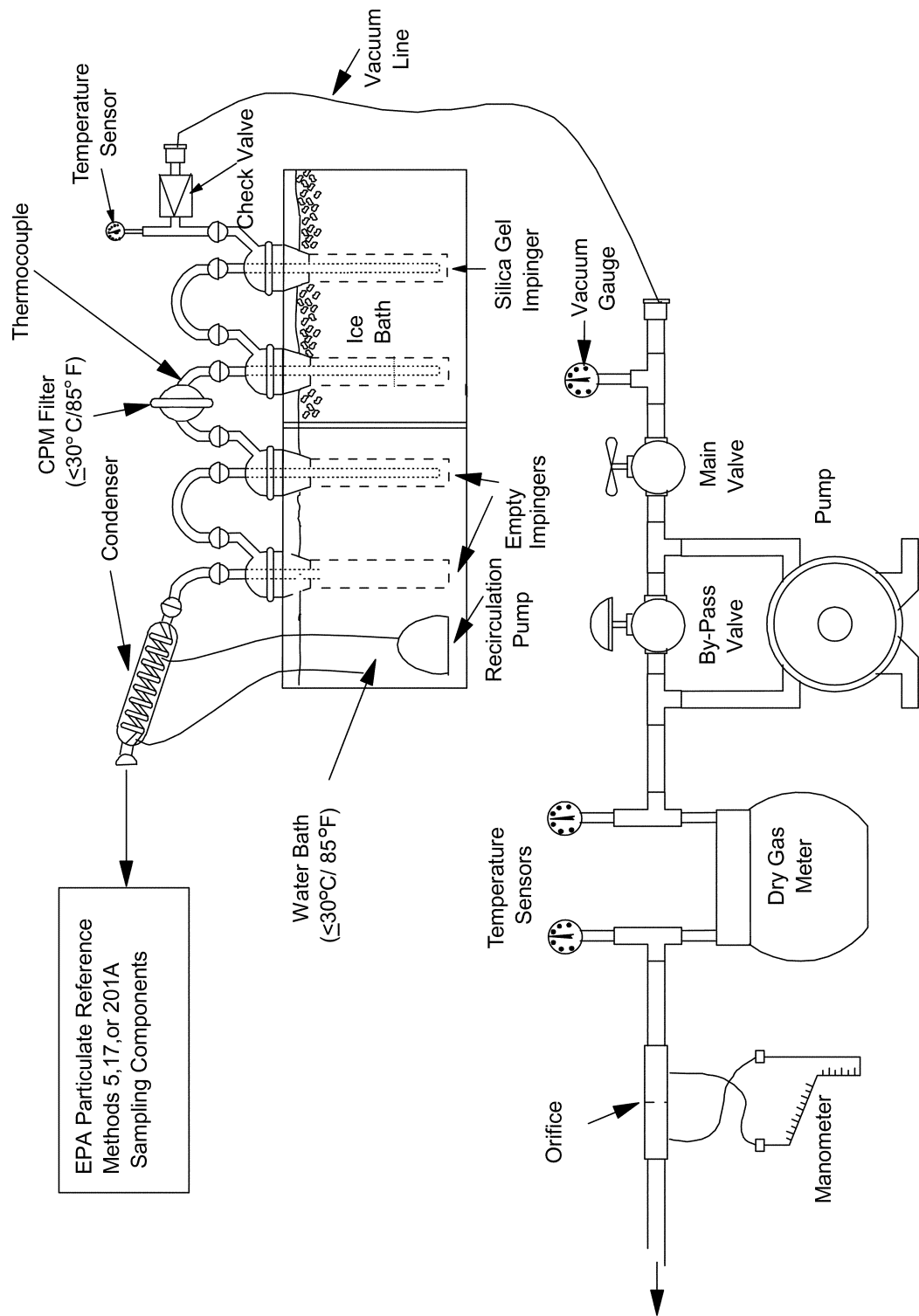


Figure 1. Schematic of Condensable Particulate Sampling Train

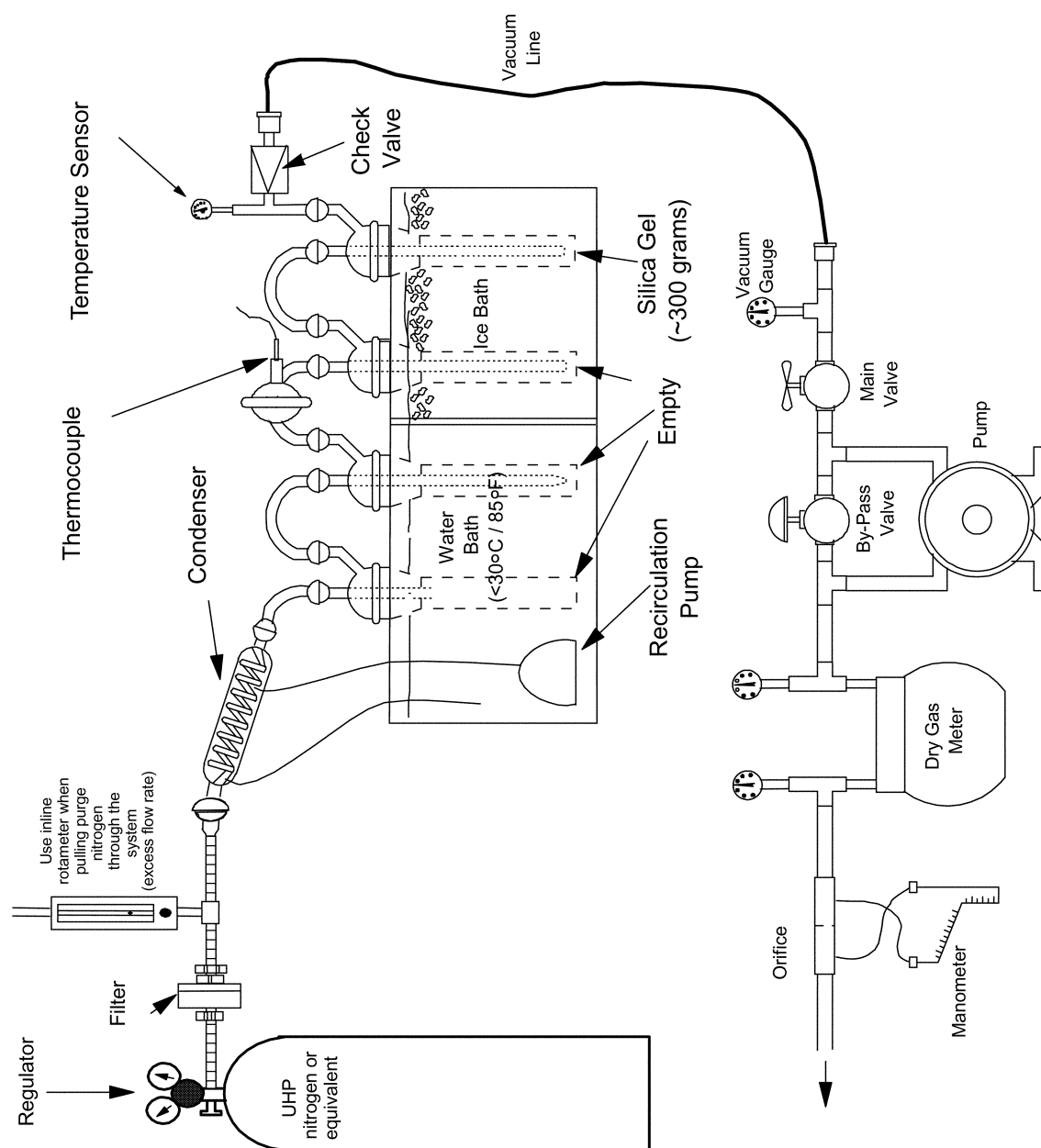


Figure 2. Nitrogen Purge Train Configuration
(Vacuum Purge)

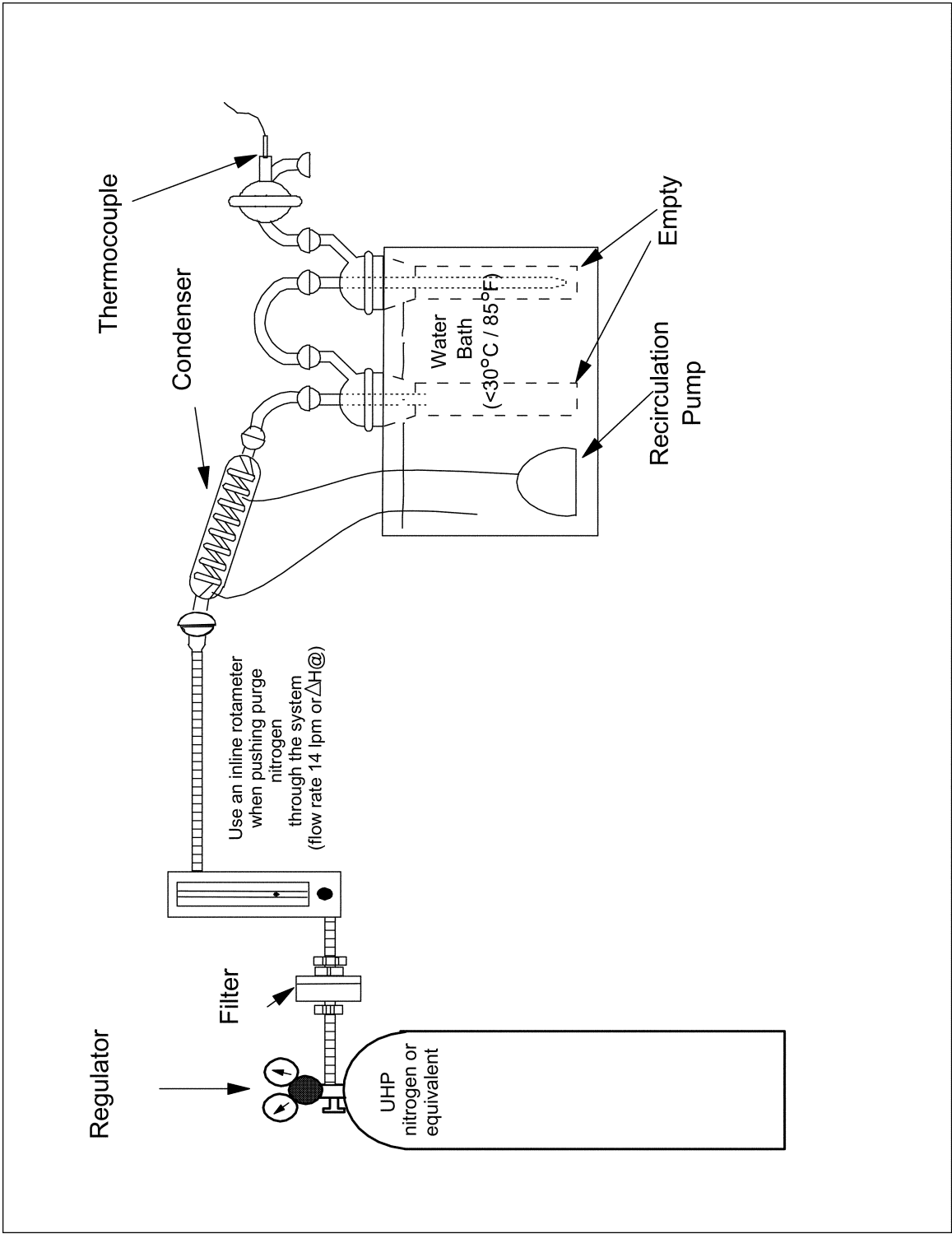


Figure 3. Nitrogen Purge Train Configuration
(Pressure Purge)

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FIGURE 4—FIELD TRAIN RECOVERY
BLANK CONDENSABLE PARTICULATE
CALCULATIONS

Field Train Recovery Blank Condensable Particulate Calculations	
Plant	

FIGURE 4—FIELD TRAIN RECOVERY
BLANK CONDENSABLE PARTICULATE
CALCULATIONS—Continued

Date	
Blank No.	
CPM Filter No.	

FIGURE 4—FIELD TRAIN RECOVERY
BLANK CONDENSABLE PARTICULATE
CALCULATIONS—Continued

Water volume added to purge train (V_p)	ml
Field Reagent Blank Mass^a	
Water (Section 11.2.7)	mg
Acetone (Section 11.2.6)	mg
Hexane (Section 11.2.8)	mg
Field Train Recovery Blank Mass	
Mass of Organic CPM (m_{ob}) (Section 11.2.3).	mg
Mass of Inorganic CPM (m_{ib}) (Equation 3).	mg

FIGURE 4—FIELD TRAIN RECOVERY
BLANK CONDENSABLE PARTICULATE
CALCULATIONS—Continued

Mass of the Field Train Recovery Blank (not to exceed 2.0 mg) (Equation 2).	mg
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^a Field reagent blanks are optional and intended to provide the testing contractor with information they can use to implement corrective actions, if necessary, to reduce the residual mass contribution from reagents used in the field. Field reagent blanks are not used to correct the CPM measurement results.

FIGURE 5—OTHER FIELD TRAIN SAM-
PLE CONDENSABLE PARTICULATE
DATA**Other Field Train Sample Condensable
Particulate Data**

Plant	
Date	
Run No.	

FIGURE 5—OTHER FIELD TRAIN SAM-
PLE CONDENSABLE PARTICULATE
DATA—Continued

CPM Filter No.	
Water volume added to purge train (max 50 ml) (V_p).	ml
Date	
Run No.	
CPM Filter No.	
Water volume added to purge train (max 50 ml) (V_p).	ml
Date	
Run No.	
CPM Filter No.	
Water volume added to purge train (max 50 ml) (V_p).	ml

FIGURE 6—CPM WORK TABLE

Calculations for Recovery of Condensable PM (CPM)

Plant	
Date	
Run No.	

Sample Preparation—CPM Containers No. 1 and 2 (Section 11.1):

Was significant volume of water lost during transport? Yes or No	.....
If Yes, measure the volume received	.....
Estimate the volume lost during transport	.....	ml
Plant		
Date		
Run No.		
Was significant volume of organic rinse lost during transport? Yes or No	.....
If Yes, measure the volume received	.....
Estimate the volume lost during transport.	.....	ml
For Titration:		
Normality of NH_4OH (N) (Section 10.2)	.....	N
Volume of titrant (V_t) (Section 11.2.2.2)	.....	ml
Mass of NH_4 added (m_c) (Equation 1)	.....	mg
For CPM Blank Weights:		
Inorganic Field Train Recovery Blank Mass (m_{ib}) (Section 9.9)	.....	mg
Organic Field Train Recovery Blank Mass (m_{ob}) (Section 9.9)	.....	mg
Mass of Field Train Recovery Blank (M_{fb}) (max. 2 mg) (Equation 2)	.....	mg
For CPM Train Weights:		
Mass of Organic CPM (m_o) (Section 11.2.3)	.....	mg
Mass of Inorganic CPM (m_i) (Equation 3)	.....	mg
Total CPM Mass (m_{cpm}) (Equation 4)	.....	mg

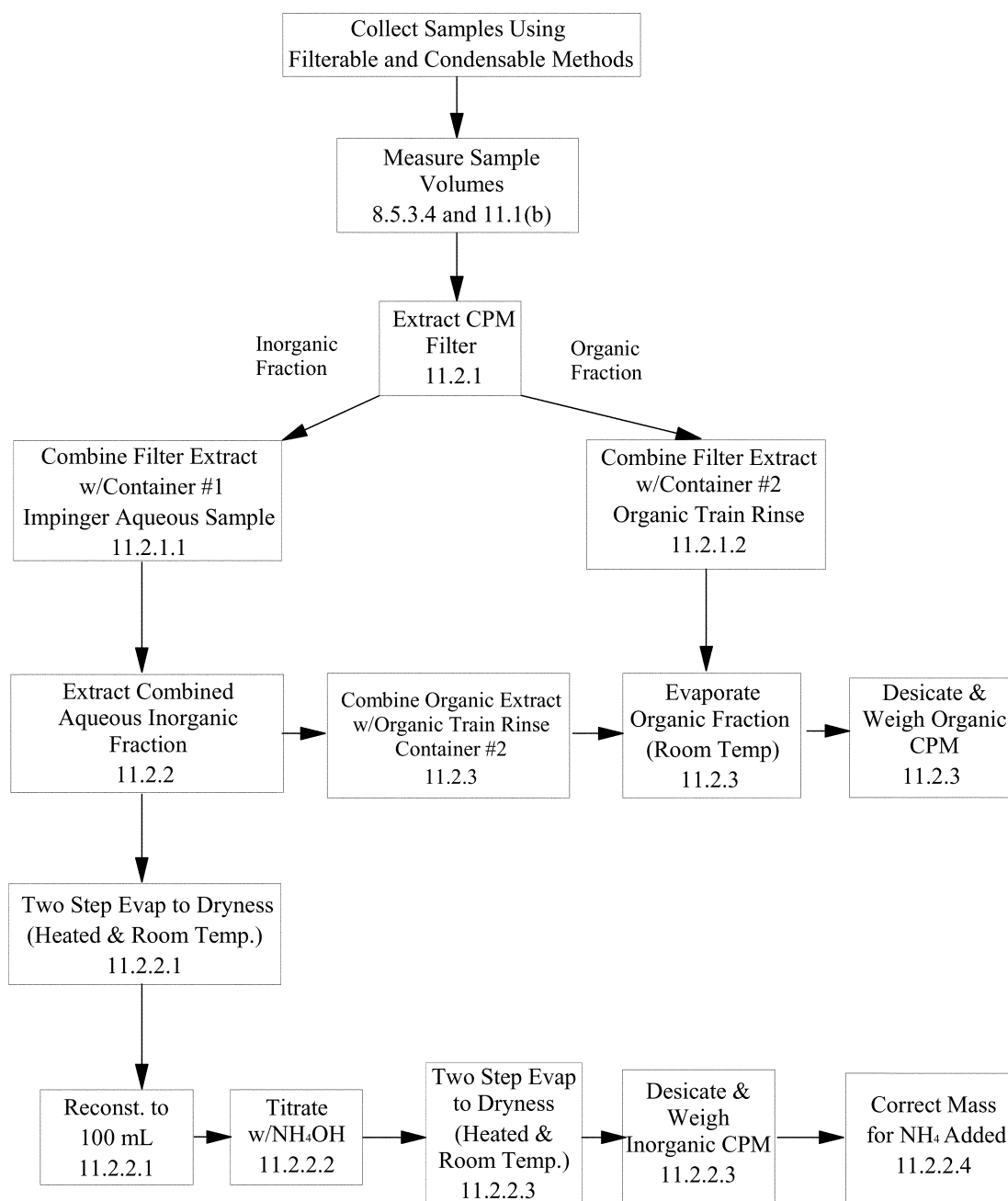


Figure 7. CPM Sample Processing Flow Chart



Federal Register

**Tuesday,
December 21, 2010**

Part III

Commodity Futures Trading Commission

17 CFR Part 1

Securities and Exchange Commission

17 CFR Part 240

**Further Definition of “Swap Dealer,”
“Security-Based Swap Dealer,” “Major
Swap Participant,” “Major Security-Based
Swap Participant” and “Eligible Contract
Participant”; Proposed Rule**

COMMODITY FUTURES TRADING COMMISSION**17 CFR Part 1**

RIN 3038-AD06

SECURITIES AND EXCHANGE COMMISSION**17 CFR Part 240**

[Release No. 34-63452; File No. S7-39-10]

RIN 3235-AK65

Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"

AGENCY: Commodity Futures Trading Commission; Securities and Exchange Commission.

ACTION: Joint proposed rule; proposed interpretations.

SUMMARY: In accordance with Section 712(d)(1) of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), the Commodity Futures Trading Commission ("CFTC") and the Securities and Exchange Commission ("SEC") (collectively, the "Commissions"), in consultation with the Board of Governors of the Federal Reserve System, are proposing rules and interpretative guidance under the Commodity Exchange Act ("CEA"), 7 U.S.C. 1 *et seq.*, and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. 78a *et seq.*, to further define the terms "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant."

DATES: Submit comments on or before February 22, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

CFTC:

- *Agency Web site*, via its Comments Online process: <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.

- *Mail*: David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

- *Hand Delivery/Courier*: Same as mail above.

- *Federal eRulemaking Portal*: Comments also may be submitted at <http://www.regulations.gov>. Follow the instructions for submitting comments.

"Definitions" must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. All comments must be submitted in English, or if not, accompanied by an English translation. All comments provided in any electronic form or on paper will be published on the CFTC Web site, without review and without removal of personally identifying information. All comments are subject to the CFTC Privacy Policy.

SEC*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/proposed.shtml>);
- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-39-10 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number S7-39-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

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Advisor, at 202-551-5550, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-7010.

SUPPLEMENTARY INFORMATION:**I. Background**

On July 21, 2010, President Obama signed the Dodd-Frank Act into law.¹ Title VII of the Dodd-Frank Act² established a comprehensive new regulatory framework for swaps and security-based swaps. The legislation was enacted, among other reasons, to reduce risk, increase transparency, and promote market integrity within the financial system, including by: (1) Providing for the registration and comprehensive regulation of swap dealers, security-based swap dealers, major swap participants and major security-based swap participants; (2) imposing clearing and trade execution requirements on swaps and security-based swaps, subject to certain exceptions; (3) creating rigorous recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commissions with respect to, among others, all registered entities and intermediaries subject to the Commissions' oversight.

More specifically, the Dodd-Frank Act provides that the CFTC will regulate "swaps," and the SEC will regulate "security-based swaps." The Dodd-Frank Act also adds to the CEA and Exchange Act definitions of the terms "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," and "eligible contract participant." These terms are defined in Sections 721 and 761 of the Dodd-Frank Act and, with respect to the term "eligible contract participant," in Section 1a(18) of the CEA,³ as re-designated and amended by Section 721 of the Dodd-Frank Act.

Section 712(d)(1) of the Dodd-Frank Act provides that the CFTC and the SEC, in consultation with the Board of Governors of the Federal Reserve System, shall jointly further define the terms "swap," "security-based swap," "swap dealer," "security-based swap dealer," "major swap participant," "major security-based swap participant," "eligible contract participant," and "security-based swap agreement."

¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at <http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm>.

² Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

³ See 7 U.S.C. 1a(18).

Further, Section 721(c) of the Dodd-Frank Act requires the CFTC to adopt a rule to further define the terms “swap,” “swap dealer,” “major swap participant,” and “eligible contract participant,” and Section 761(b) of the Dodd-Frank Act permits the SEC to adopt a rule to further define the terms “security-based swap,” “security-based swap dealer,” “major security-based swap participant,” and “eligible contract participant,” with regard to security-based swaps, for the purpose of including transactions and entities that have been structured to evade Title VII of the Dodd-Frank Act.⁴

In light of the requirements in the Dodd-Frank Act noted above, the CFTC and the SEC issued a joint Advance Notice of Proposed Rulemaking (“ANPRM”) on August 13, 2010, requesting public comment regarding the definitions of “swap,” “security-based swap,” “security-based swap agreement,” “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant,” and “eligible contract participant” in Title VII of the Dodd-Frank Act.⁵ The Commissions reviewed more than 80 comments in response to the ANPRM. The Commissions also informally solicited comments on the definitions on their respective Web sites.⁶ In addition, the staffs of the CFTC and the SEC have met with many market participants and other interested parties to discuss the definitions.⁷

In this release, the Commissions propose to further define “swap dealer,” “security-based swap dealer,” “major swap participant,” “major security-based swap participant” and “eligible contract participant,” and propose related rules, and also discuss certain factors that are relevant to market participants when determining their status with respect to the defined terms. In developing these proposals, the Commissions have been mindful that the markets for swaps and security-based swaps are evolving, and that the rules that we adopt will, as intended by the Dodd-Frank Act,

significantly affect those markets. The rules not only will help determine which entities will be subject to comprehensive regulation of their swap and security-based swap activities, but may also cause certain entities to modify their activities to avoid being subject to the regulations. As a result, we are aware of the importance of crafting these rules carefully to maximize the benefits of the regulation imposed by the Dodd-Frank Act, and to do so in a way that is flexible enough to respond to market developments. While we preliminarily believe that these proposals, if adopted, would appropriately effect the intent of the Dodd-Frank Act, we are very interested in commenters’ views as to whether we have achieved this purpose, and, if not, how to improve these proposals.⁸

II. Definitions of “Swap Dealer” and “Security-Based Swap Dealer”

The Dodd-Frank Act defines the terms “swap dealer” and “security-based swap dealer” in terms of whether a person engages in certain types of activities involving swaps or security-based swaps.⁹ Persons that meet either of those definitions are subject to statutory requirements related to, among other things, registration, margin, capital and business conduct.¹⁰

The two definitions in general encompass persons that engage in any of the following types of activity:

⁸ In addition, we recognize that the appropriateness of these proposals also should be considered in light of the substantive requirements that will be applicable to dealers and major participants, including capital, margin and business conduct requirements, which are the subject of separate rulemakings. For example, whether the definition of a major participant is too broad or too narrow may well depend in part on the substantive requirements applicable to such entities, and whether those substantive requirements are themselves appropriate may in turn depend in part on the scope of the major participant definition. We therefore encourage comments that take into account the interplay between the proposed definitions and these substantive requirements.

⁹ See Section 721 of the Dodd-Frank Act (defining “swap dealer” in new Section 1a(49) of the CEA, 7 U.S.C. 1a(49)) and Section 761 of the Dodd-Frank Act (defining “security-based swap dealer” in new Section 3(a)(71) of the Exchange Act, 15 U.S.C. 78c(a)(71)).

¹⁰ The Dodd-Frank Act excludes from the Exchange Act definition of “dealer” persons who engage in security-based swap transactions with eligible contract participants. See Section 3(a)(5) of the Exchange Act, 15 U.S.C. 78c(a)(5), as amended by Section 761(a)(1) of the Dodd-Frank Act.

The Dodd-Frank Act does not include comparable amendments for persons who act as brokers in swaps and security-based swaps. Because security-based swaps are a type of security, persons who act as brokers in connection with security-based swaps must, absent an exemption, register with the SEC as a broker pursuant to Exchange Act section 15(a), and comply with the Exchange Act’s requirements applicable to brokers.

(i) Holding oneself out as a dealer in swaps or security-based swaps,

(ii) Making a market in swaps or security-based swaps,

(iii) Regularly entering into swaps or security-based swaps with counterparties as an ordinary course of business for one’s own account, or

(iv) Engaging in activity causing oneself to be commonly known in the trade as a dealer or market maker in swaps or security-based swaps.¹¹

The definitions are disjunctive, in that a person that engages in any of the enumerated dealing activities is a swap dealer or security-based swap dealer even if the person does not engage in any of the other enumerated activities.

The definitions, in contrast, do not include a person that enters into swaps or security-based swaps “for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.”¹² The Dodd-Frank Act also instructs the Commissions to exempt from designation as a dealer an entity that “engages in a *de minimis* quantity of [swap or security-based swap] dealing in connection with transactions with or on behalf of its customers.”¹³ Moreover, the definition of “swap dealer” (but not the definition of “security-based swap dealer”) provides that an insured depository institution is not to be considered a swap dealer “to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.”¹⁴

The definitions also provide that a person may be designated as a dealer for one or more types, classes or categories of swaps, security-based swaps, or activities without being designated a dealer for other types, classes or categories or activities.¹⁵

The Commissions are proposing rules to further define certain aspects of the meaning of “swap dealer” and “security-based swap dealer,” and are providing guidance on how the Commissions propose to interpret these terms. This release specifically addresses: (A) The types of activities that would cause a person to be a swap dealer or security-based swap dealer, including differences in how those two definitions should be applied; (B) the statutory provisions requiring the Commissions to exempt persons from the dealer

¹¹ See CEA section 1a(49)(A); Exchange Act section 3(a)(71)(A).

¹² See CEA section 1a(49)(C); Exchange Act section 3(a)(71)(C).

¹³ See CEA section 1a(49)(D); Exchange Act section 3(a)(71)(D).

¹⁴ CEA section 1a(49)(A).

¹⁵ See CEA section 1a(49)(B); Exchange Act section 3(a)(71)(B).

⁴ The definitions of the terms “swap,” “security-based swap,” and “security-based swap agreement,” and regulations regarding mixed swaps are the subject of a separate rulemaking by the Commissions.

⁵ See Definitions Contained in Title VII of Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Rel. No. 34–62717, 75 FR 51429 (Aug. 20, 2010). The comment period for the ANPRM closed on September 20, 2010.

⁶ Comments were solicited by the CFTC at http://www.cftc.gov/LawRegulation/DoddFrankAct/OTC_2_Definitions.html and the SEC at <http://www.sec.gov/spotlight/regreformcomments.shtml/>.

⁷ The views expressed in the comments in response to the ANPRM, in response to the Commissions’ informal solicitation, and at such meetings are collectively referred to as the views of “commenters.”

definitions in connection with *de minimis* activity; (C) the exception from the “swap dealer” definition in connection with loans by insured depository institutions; (D) the possibility that a person may be considered a dealer for some types, classes or categories of swaps, security-based swaps, or activities but not others; and (E) certain interpretative issues that arise in particular situations. The Commissions request comment on all aspects of the proposals, including the particular points noted in the discussion below.

A. Swap and Security-Based Swap Dealing Activity

1. Comments Regarding Dealing Activities

Commenters provided numerous examples of conduct they viewed as dealing activities—as well as conduct they did not view as dealing activities. For example, many of the commenters stated that dealers provide “bid/ask” or “two-way” prices for swaps on a regular basis, or regularly participate in both sides of the swap market. Some commenters indicated that dealers perform an intermediary function. Other commenters stated that a person holds itself out as a dealer if it consistently and systematically markets itself as a swap dealer to third parties. Some commenters described market makers in the swap markets as persons that stand ready to buy or sell swaps at all times, are open to doing swaps business on both sides of a market, or make bids to buy and offers to sell swaps or a type of swap at all times. Commenters stated that a person should be included in the definition of dealer if its sole or dominant line of business is swaps activity. One commenter urged the Commissions to adopt a swap association’s definition of a primary member as the definition of dealer.

Some commenters stated that the definition of dealer should be read narrowly. For example, some commenters suggested that the market maker concept should not encompass persons that provide occasional quotes or that do not make bids or offers consistently or at all times. Another commenter stated that a willingness to buy or sell a swap or security-based swap at a particular time does not constitute market making absent the creating of a two-way market. One commenter suggested that solely acting as a market maker should not cause a person to be a dealer, since firms may have commercial purposes for offering two-way trades. Another commenter stated that an entity that “holds itself

out” as a dealer should qualify as a swap dealer only if it “consistently and systematically markets itself as a dealer to third parties.”¹⁶

Many commenters called for the exclusion of particular types of persons from the definition of swap dealer or security-based swap dealer. Several commenters maintained that commercial end-users of swaps or security-based swaps that enter into swaps or security-based swaps to hedge or mitigate commercial risk should be excluded from the definitions. Another commenter stated the definitions should exclude persons who use swaps or security-based swaps for bona fide hedging. Other commenters indicated that cooperatives that enter into swaps in connection with the business of their members should be excluded. Commenters also stated that if all of a person’s swaps are cleared on an exchange or derivatives clearing organization, the person should not be deemed to be a dealer. One commenter stated competitive power suppliers should be excluded, and another stated that the dealer definition should not apply to futures commission merchants that act economically like brokers.

Commenters, particularly those in the securities industry, urged the Commissions to interpret the definitions of swap dealer and security-based swap dealer consistently with precedent that distinguishes between dealers in securities and traders in securities. However, one commenter also noted that some concepts from the securities and commodities laws may not easily be applied to these markets.

2. Application of the Core Tests to “Swap Dealers” and “Security-Based Swap Dealers”

The Dodd-Frank Act defines the terms “swap dealer” and “security-based swap dealer” in a functional manner, encompassing how a person holds itself out in the market, the nature of the conduct engaged in by the person, and how the market perceives the person’s activities. This suggests that the definitions should not be interpreted in a constrained or overly technical manner. Rigid standards would not provide the necessary flexibility to respond to evolution in the ways that dealers enter into swaps and security-based swaps. The different types of swap and security-based swap markets

are diverse, and there does not appear to be a single set of criteria that can be determinative in all markets.

At the same time, we note that there may be certain distinguishing characteristics of swap dealers and security-based swap dealers, including that:

- Dealers tend to accommodate demand for swaps and security-based swaps from other parties;
- Dealers are generally available to enter into swaps or security-based swaps to facilitate other parties’ interest in entering into those instruments;
- Dealers tend not to request that other parties propose the terms of swaps or security-based swaps; rather, dealers tend to enter into those instruments on their own standard terms or on terms they arrange in response to other parties’ interest; and
- Dealers tend to be able to arrange customized terms for swaps or security-based swaps upon request, or to create new types of swaps or security-based swaps at the dealer’s own initiative.

We also recognize that the principles relevant to identifying dealing activity involving swaps can differ from comparable principles associated with security-based swaps. These differences are due, in part, to differences in how those instruments are used. For example, because security-based swaps may be used to hedge or gain economic exposure to underlying securities (while recognizing distinctions between securities-based swaps and other types of securities, as discussed below), there is a basis to build upon the same principles that are presently used to identify dealers for other types of securities. Accordingly, we separately address how the core tests would apply to swap dealers and to security-based swap dealers.

a. Application to Swap Dealers

The definition of swap dealer should be informed by the differences between swaps, on the one hand, and securities and commodities, on the other. Transactions in cash market securities and commodities generally involve purchases and sales of tangible or intangible property. Swaps, in contrast, are notional contracts requiring the performance of agreed terms by each party.¹⁷ Thus, many of the concepts cited by commenters, such as whether a person buys and sells swaps or makes a two-sided market in swaps or trades within a bid/offer spread, cannot

¹⁶ See letter from Eric Dennison, Sr. Vice President and General Counsel, Stephanie Miller, Assistant General Counsel—Commodities, and Bill Hellinghausen, Director of Regulatory Affairs, EDF Trading, dated September 20, 2010 (distinguishing transactions that the commenter enters into as part of energy management services).

¹⁷ As discussed below, however (see note 42, *infra*), the Dodd-Frank Act amended the Exchange Act definitions of “buy,” “purchase,” “sale” and “sell” to apply to particular actions involving security-based swaps.

necessarily be applied to all types of swaps to determine if the person is a swap dealer. We understand that market participants do use this terminology colloquially to describe the process of entering into a swap. For example, a person seeking a fixed/floating interest rate swap may inquire as to the fixed rates, spread above the floating rate and other payments that another person would require in order to enter into a swap. But, while these persons may discuss bids, offers, prices and so forth, the parties are negotiating the terms of a contract, they are not negotiating the price at which they will transfer ownership of tangible or intangible property. Accordingly, these concepts are not determinative of whether a person is a “swap dealer.”

Instead, persons who are swap dealers may be identified by the functional role they fulfill in the swap markets. As noted above, swap dealers tend to accommodate demand and to be available to enter into swaps to facilitate other parties’ interest in swaps (although swap dealers may also advance their own investment and liquidity objectives by entering into such swaps). In addition, swap dealers can often be identified by their relationships with counterparties. Swap dealers tend to enter into swaps with more counterparties than do non-dealers, and in some markets, non-dealers tend to constitute a large portion of swap dealers’ counterparties. In contrast, non-dealers tend to enter into swaps with swap dealers more often than with other non-dealers.¹⁸ The Commissions can most efficiently achieve the purposes underlying Title VII of the Dodd-Frank Act—to reduce risk and to enhance operational standards and fair dealing in the swap markets—by focusing their attention on those persons whose function is to serve as the points of connection in those markets. The definition of swap dealer, construed functionally in the manner set forth above, will help to identify those persons.

Clause (A)(iii) of the statutory definition of swap dealer, which includes any person that “regularly enters into swaps with counterparties as an ordinary course of business for its own account,”¹⁹ has been the subject of

significant uncertainty among commenters. The commenters point out that its literal terms could encompass many parties who regularly enter into swaps without engaging in any form of swap dealing activity. In this regard, clause (A)(iii) of the definition should be read in combination with the express exception in subparagraph (C) of the swap dealer definition, which excludes “a person that enters into swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.” Thus, the difference between the inclusion in clause (A)(iii) and the exclusion in subparagraph (C) is whether or not the person enters into swaps as a part of, or as an ordinary course of, a “regular business.”²⁰ We believe that persons who enter into swaps as a part of a “regular business” are those persons whose function is to accommodate demand for swaps from other parties and enter into swaps in response to interest expressed by other parties. Conversely, persons who do not fulfill this function should not be deemed to enter into swaps as part of a “regular business” and are not likely to be swap dealers.

In sum, to determine if a person is a swap dealer, we would consider that person’s activities in relation to the other parties with which it interacts in the swap markets. If the person is available to accommodate demand for swaps from other parties, tends to propose terms, or tends to engage in the other activities discussed above, then the person is likely to be a swap dealer. Persons that rarely engage in such activities are less likely to be deemed swap dealers.

We request comment on this interpretive approach for identifying whether a person is a swap dealer.

b. Application to Security-Based Swap Dealers

The definition of “security-based swap dealer” has parallels to the definition of “dealer” under the Exchange Act.²¹ In addition, security-

entered into swaps as an agent for customers (*i.e.*, for the customers’ accounts) would be required to register as either a Futures Commission Merchant, Introducing Broker, Commodity Pool Operator or Commodity Trading Advisor, depending on the nature of the person’s activity.

²⁰ The definition of “security-based swap dealer” is structured similarly, and should be interpreted similarly.

²¹ The Exchange Act in relevant part defines “dealer” to mean “any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person’s own account through a broker or otherwise,” but with an exception for “a person that buys or sells securities

based swaps may be used to hedge risks associated with the ownership of certain other types of securities,”²² and security-based swaps may be used to gain economic exposure akin to ownership of certain other types of securities.²³ As a result, the SEC would consider the same factors that are relevant to determining whether a person is a “dealer” under the Exchange Act as also generally relevant to the analysis of whether a person is a security-based swap dealer.

The Exchange Act has been interpreted to distinguish between “dealers” and “traders.” In this context, the SEC previously has noted that the dealer-trader distinction:

Recognizes that dealers normally have a regular clientele, hold themselves out as buying or selling securities at a regular place of business, have a regular turnover of inventory (or participate in the sale or distribution of new issues, such as by acting as an underwriter), and generally provide liquidity services in transactions with investors (or, in the case of dealers who are market makers, for other professionals).²⁴

Other non-exclusive factors that are relevant for distinguishing between dealers and non-dealers can include the receipt of customer property and the furnishing of incidental advice in connection with transactions.

The markets involving security-based swaps are distinguishable in certain respects from markets involving cash market securities—particularly with regard to the concepts of “inventory” (which generally appears inapplicable in this context)²⁵ and “regular place of business.” For example, the suggestion that dealers are more likely to operate at a “regular place of business” than traders should not be construed in a way that ignores the reality of how the security-based swap markets operate (or that

(not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person’s own account, either individually or in a fiduciary capacity, but not as a part of a regular business.” Exchange Act sections 3(a)(5)(A) and (B), 15 U.S.C. 78c(a)(5)(A) and (B), as amended by Section 761(a)(1) of the Dodd-Frank Act.

²² For example, an entity that owns a particular security may use a security-based swap to hedge the risks of that security. Conversely, an entity may seek to offset exposure involving a security-based swap by using another security as a hedge.

²³ For example, an entity may enter into a security-based swap to gain economic exposure akin to a long or short position in a stock or bond, without having to engage in a cash market transaction for that instrument.

²⁴ Securities Exchange Act Release No. 47364 (Feb. 13, 2003) (footnotes omitted).

²⁵ In particular, an analysis that considers dealers to differ from traders in part because dealers have regular turnover in “inventory” appears not to apply in the context of security-based swaps, given that those instruments are created by contract between two market counterparties, rather than reflecting financial risks issued by third-parties.

¹⁸ Some of the commenters appeared to suggest that significant parts of the swap markets operate without the involvement of swap dealers. We believe that this analysis is likely incorrect, and that the parties that fulfill the function of dealers should be identified and are likely to be swap dealers.

¹⁹ We interpret this reference to a person entering into swaps “with counterparties * * * for its own account” to refer to a person entering into a swap as a principal, and not as an agent. A person who

ignores evolution in dealing practices involving other types of securities). Dealers may use a variety of methods to communicate their availability to enter into security-based swaps with other market participants. The dealer-trader distinction should not be applied to the security-based swap markets without taking those distinctions into account.²⁶ Even in light of those differences, however, we believe that the dealer-trader distinction provides an important analytical tool to assist in determining whether a person is a “security-based swap dealer.”

Commenters have raised concerns that the ambit of the security-based swap dealer definition could encompass end-users that use security-based swaps for hedging their business risks. Deeming those entities to be security-based swap dealers due to their hedging activities could discourage their use of hedging transactions or subject them to a regulatory framework that was not intended to address their businesses and could subject them to unnecessary costs. Under the dealer-trader distinction, however, we would expect entities that use security-based swaps to hedge their business risks, absent other activity, likely would not be dealers.²⁷ Also, as discussed below, both the “security-based swap dealer” definition and the dealer-trader distinction in part turn on whether a person holds itself out as a dealer.

We request comment on the application of the dealer-trader distinction as part of the analysis of whether a person is a security-based swap dealer.

²⁶ The definition of “security-based swap dealer,” unlike the Exchange Act’s definition of “dealer,” does not specifically refer to “buying” and “selling.” We do not believe that this language difference is significant, however, as the Dodd-Frank Act amended the Exchange Act definitions of “buy” and “purchase,” and the Exchange Act definitions of “sale” and “sell,” to encompass the execution, termination (prior to its scheduled maturity date), assignment, exchange or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap. See Dodd-Frank Act sections 761(a)(3), (4) (amending Exchange Act sections 3(a)(13), (14)).

²⁷ Of course, if a person’s other activities satisfy the definition of security-based swap dealer, it must comply with the applicable requirements with regard to all of its security-based swap activities, absent an order to the contrary, as discussed below. Also, as discussed below, we would expect end-users to use security-based swaps for hedging purposes less commonly than they use swaps for hedging purposes.

c. Issues Common to Both Definitions

i. Holding Oneself Out as, and Being Commonly Known in the Trade as, a Swap Dealer or Security-Based Swap Dealer

As noted above, the application of these definitions to persons that “hold themselves out” as dealers or that are “commonly known in the trade” as dealers highlights the need for a functional interpretation of the dealer definitions. We believe that factors that may reasonably indicate that a person is holding itself out as a dealer or is commonly known in the trade as a dealer may include (but are not limited to) the following:

- Contacting potential counterparties to solicit interest in swaps or security-based swaps,
- Developing new types of swaps or security-based swaps (which may include financial products that contain swaps or security-based swaps) and informing potential counterparties of the availability of such swaps or security-based swaps and a willingness to enter into such swaps or security-based swaps with the potential counterparties,
- Membership in a swap association in a category reserved for dealers,
- Providing marketing materials (such as a Web site) that describe the types of swaps or security-based swaps that one is willing to enter into with other parties, or
- Generally expressing a willingness to offer or provide a range of financial products that would include swaps or security-based swaps.

Notably, holding oneself out as a security-based swap dealer would likely encompass a situation in which a person that is a “dealer” in another type of security enters into a security-based swap with a customer.²⁸ Another example of holding oneself out as a security-based swap dealer would likely be an entity expressing its availability to provide liquidity to counterparties that seek to enter into security-based swaps, regardless of the “direction” of the transaction or across a broad spectrum of risks (e.g., credit default swaps related to a variety of issuers).

The determination of who is commonly known in the trade as a swap

²⁸ For example, if a person that is a dealer in securities that are not security-based swaps enters into a security-based swap transaction with one of its cash market customers, the person would appear to be engaged in security-based swap dealing activity with that customer. In that circumstance, the customer reasonably would be expected to view the person as a dealer for purposes of the security-based swap, making the applicable business conduct requirements particularly important.

dealer or security-based swap dealer may appropriately reflect, among other factors, the perspective of persons with substantial experience with and knowledge of the swap and security-based swap markets, regardless of whether an entity is known as a dealer by persons without that experience and knowledge.

ii. Making a Market in Swaps or Security-Based Swaps

A number of commenters suggested that the market making component of the definitions should apply only to persons that quote a two-sided market consistently or at all times. Some commenters also suggested that a person’s willingness to buy or to sell a swap or security-based swap at any particular time should not be deemed to be market making activity. While continuous two-sided quotations and a willingness to stand ready to buy and sell a security are important indicators of market making in the equities markets,²⁹ these indicia may not be appropriate in the context of the swap or security-based swap markets, given that parties do not enter into many types of swaps or security-based swaps on a continuous basis, and that parties may use a variety of methods for communicating their willingness to enter into swaps or security-based swaps. Any analysis that would impute to the definitions a “continuous” activity requirement may cause certain persons that engage in non-continuous dealing activities not to be regulated as swap dealers or security-based swap dealers. We have not identified anything in the statutory text or legislative history of the Dodd-Frank Act to suggest that Congress intended such a result.

iii. No Predominance Test

Although some commenters suggested that a person should be a swap dealer or security-based swap dealer only if such activity is the person’s sole or predominant business, the statutory definition does not contain a predominance test or otherwise depend upon the level of the person’s dealing activity, other than the *de minimis* exception discussed below. A predominance standard would not

²⁹ See Exchange Act Release No. 58875 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008) (“Although determining whether or not a market maker is engaged in bona-fide market making would depend on the facts and circumstances of the particular activity, factors that indicate a market maker is engaged in bona-fide market making activities may include, for example, whether the market maker incurs any economic or market risk with respect to the securities (e.g., by putting their own capital at risk to provide continuous two-sided quotes in markets).”).

provide a workable test of dealer status because many of the parties that are commonly acknowledged as swap or security-based swap dealers also engage in other businesses that often outweigh their swap or security-based swap dealing business in terms of transaction volume or other measures. Based on the plain meaning of the statutory definition, so long as a person engages in dealing activity that is not *de minimis*, as discussed below, the person is a swap dealer or security-based swap dealer.³⁰

iv. Application of the Definition to New Types of Swaps and New Activities

The Commissions intend to apply the definitions of swap dealer and security-based swap dealer flexibly when the development of innovative business models is accompanied by new types of dealer activity. As discussed above, the Commissions generally intend to follow a “facts-and-circumstances” approach with respect to identifying dealing activities. The dealer definitions must be flexible enough to cover appropriate persons as the swap markets evolve.

v. Request for Comment

The Commissions request comment on these interpretations of holding oneself out as a dealer and being commonly known in the trade as a dealer, as well as the lack of a predominance test, and the application of the definitions to new types of swaps and new activities. Commenters particularly are requested to address the relevance, to the dealer analysis, of activities such as an entity’s membership in a swap execution facility (“SEF”) or a security-based SEF, or use of facilities that may not be SEFs or security-based SEFs. Are there factors that would lead entities to become members of SEFs that would not make membership relevant to the dealer analysis? Commenters also are requested to generally address how the dealer analysis should appropriately apply the requirements applicable to dealers (e.g., capital, margin and business conduct requirements) to the entities that should be subject to those requirements. In addition, commenters are requested to address how the dealer definitions should be applied to entities such as, for example, Federal home loan banks subject to restrictions limiting their dealing activities to particular types of counterparties. Finally,

commenters are requested to address whether additional guidance is advisable to help identify dealer activity and to promote effective enforcement of the requirements applicable to swap dealers and security-based swap dealers.

3. Designation of a Person as a Swap Dealer

The Dodd-Frank Act has amended the CEA and the Exchange Act to require a person that meets either of the definitions to register as a swap dealer and/or security-based swap dealer,³¹ and the Commissions are proposing separate rules regarding this registration requirement. In connection with the registration requirement, market participants are in a position to assess their activities to determine whether they function in the manner described in the definitions. In addition, the Commissions have the authority to take enforcement actions in response to a dealer’s failure to register. In determining whether a person meets the applicable definitions, the Commissions may use information from other regulators, swap data repositories, registered clearing agencies, derivatives clearing organizations and other sources.

4. Application of the Swap Dealer Definition to Agricultural Commodities

Section 723(c)(3)(B) of the Dodd-Frank Act provides that swaps in agricultural commodities shall be subject to such terms and conditions as the CFTC may prescribe. In a separate rulemaking, the CFTC has proposed a definition of the term “agricultural commodity.”³² Acting under the authority in Section 723(c)(3)(B), the CFTC may develop particular terms and conditions for the interpretation of the swap dealer definition when it is applied to dealing in swaps in agricultural commodities. Any such terms and conditions would not be applicable to the definition of security-based swap dealer. The CFTC requests comment on the application of the swap dealer definition to dealers, including potentially agricultural cooperatives, that limit their dealing activity primarily to swaps in agricultural commodities. The CFTC may consider any comments on this topic for both the definition of swap dealer and also for any rulemaking regarding swaps in agricultural commodities.

B. De Minimis Exemption to the Definitions

The Dodd-Frank Act requires that the Commissions exempt, from designation as a “swap dealer” or “security-based swap dealer,” a person who “engages in a *de minimis* quantity of [swap or security-based swap] dealing in connection with transactions with or on behalf of its customers.”³³ The statutory definitions do not require that the Commissions fix a specific level of swap activity that will be considered *de minimis*, but instead require that the Commissions “promulgate regulations to establish factors with respect to the making of this determination to exempt.”

1. Comments Regarding the De Minimis Exemption

Some commenters asserted that the *de minimis* exemption should be linked to systemic risk concerns, stating that persons engaged in dealing activities that do not pose systemic risk should be able to take advantage of the exemption. Other commenters suggested that a person’s dealing activities should be considered *de minimis* if they do not pose undue risks to the person. Commenters also expressed the view that the application of the exemption should be based on quantitative criteria.

2. Proposed Rule Regarding the De Minimis Exemption

The Commissions preliminarily believe that the “*de minimis*” exemption should be interpreted to address amounts of dealing activity that are sufficiently small that they do not warrant registration to address concerns implicated by the regulations governing swap dealers and security-based swap dealers.³⁴ In other words, the exemption should apply only when an entity’s dealing activity is so minimal that applying dealer regulations to the entity would not be warranted.

We thus preliminarily do not agree with those commenters that argued that

³³ See CEA section 1a(49)(D); Exchange Act section 3(a)(71)(D).

³⁴ The Title VII requirements applicable to swap and security-based swap dealers include, for example: requirements that dealers conform to regulatory standards relating to the confirmation, processing, netting, documentation and valuation of swaps and security-based swaps (CEA section 4s(i), Exchange Act section 15F(i)); requirements that dealers disclose, to regulators, information concerning terms and conditions of swaps or security-based swaps, as well as information concerning trading practices, financial integrity protections and other trading information (CEA section 4s(j)(3), Exchange Act section 15F(j)(3)); conflicts of interest provisions (CEA section 4s(j)(5), Exchange Act section 15F(j)(5)); and chief compliance officer requirements (CEA section 4s(k), Exchange Act section 15F(k)).

³⁰ As one example, a non-financial company that engages in both swap dealing and other commercial activities would fall within the definition of swap dealer because of its swap dealing activities, notwithstanding that it also engages in other commercial activities.

³¹ See CEA section 4s(a)–(b); Exchange Act section 15F(a)–(b).

³² See 75 FR 65586 (Oct. 26, 2010).

a *de minimis* quantity of dealing should be measured in relation to the level of the person's other activities (or other swap or security-based swap activities). Aside from the fact that the statute does not explicitly call for a relative test, such an approach would lead to the result that larger and more active companies, which presumably would be more able to influence the swap markets, would be more likely to qualify for the exemption than smaller and less active companies. Also, a relative test not only would require a means of measuring the person's dealing activities, but also would require a means of measuring the larger scope of activities to which its swap dealing or security-based swap dealing activities are to be compared, thus introducing unnecessary complexity to the exemption's application.

Our proposed factors for the *de minimis* exemption seek to focus the availability of the exemption toward entities for which registration would not be warranted from a regulatory point of view in light of the limited nature of their dealing activities. At the same time, we recognize that this focus does not appear to readily translate into objective criteria. Thus, while the proposed factors discussed below reflect our attempt to delimit the *de minimis* exemption appropriately, we recognize that a range of alternative approaches may be reasonable, and we are particularly interested in commenters' suggestions as to the appropriate factors.

The first proposed factor is that the aggregate effective notional amount, measured on a gross basis, of swaps or security-based swaps that an entity enters into over the prior 12 months in connection with its dealing activities³⁵ could not exceed \$100 million.³⁶ We understand that in general the notional size of a small swap or security-based swap is \$5 million or less, and this

proposed threshold would reflect 20 instruments of that size. Given the customer protection issues raised by swaps and security-based swaps—including the risks that counterparties may not fully appreciate when entering into swaps or security-based swaps—we believe that this notional amount reflects a reasonable limit for identifying those entities that engage in a *de minimis* level of dealing activity.³⁷ This standard would measure an entity's quantity of dealing on a gross basis (without consideration of the market risk offsets associated with combining long and short positions) to reflect the entity's overall amount of dealing activity. Similarly, the proposed notional threshold would not account for the amount of collateral held by or provided by the entity, nor other risk mitigating factors, in determining whether it engages in a *de minimis* quantity of dealing, given that dealer status focuses on an entity's absolute level of activity, and is not directly based on the risks that an entity poses or faces.³⁸

In addition, the aggregate effective notional amount of such swaps or security-based swaps, in which the person's counterparty is a "special entity" (as that term is defined in CEA Section 4s(h)(2)(C) and Exchange Act Section 15F(h)(2)(C)),³⁹ that an entity enters into over the prior 12 months could not exceed \$25 million.⁴⁰ The Dodd-Frank Act provided special protections to special entities in connection with swaps and security-based swaps, and we preliminarily believe that this lower proposed threshold reasonably reflects the special protections afforded to those entities.

In addition, to take advantage of the *de minimis* exemption, the proposed rule would provide that the entity could not have entered into swaps or security-based swaps (as applicable) as a dealer with more than 15 counterparties, other than security-based swap dealers, over the prior 12 months.⁴¹ The

Commissions preliminarily believe that an entity that enters into swaps or security-based swaps, in a dealer capacity, with a larger number of counterparties should be registered to help achieve Title VII's orderly market goals, and thus cannot be said to engage in a *de minimis* quantity of dealing (even if the aggregate effective notional amount of the swaps or security-based swaps is less than the thresholds noted above).⁴² For purposes of determining the number of counterparties, we preliminarily believe that counterparties who are members of an affiliated group would generally count as one counterparty, given that the purpose of the limit is to measure the scope of dealer's interaction with separate counterparties.⁴³

Finally, the proposed rule would provide that, to take advantage of the *de minimis* exemption, the entity could not have entered into more than 20 swaps or security-based swaps (as applicable) as a dealer during the prior 12 months.⁴⁴ As is the case for the limitation on the number of counterparties, the Commissions preliminarily believe that an entity that enters into a larger number of swaps or security-based swaps, in a dealer capacity, would, if registered, help achieve Title VII's orderly market goals, and thus cannot be said to engage in a *de minimis* quantity of dealing. For these purposes, we would expect that each separate transaction the entity enters into under a swap or security-based swap master agreement in general would count as entering into a swap or security-based swap, but that an amendment of an existing swap or security-based swap in which the counterparty remained the same and the underlying item remained substantially the same would not count as a new swap or security based swap.⁴⁵

12 months provides certainty. As of the end of each month, the entity will know whether it may qualify for the exemption during the following month.

⁴² Similarly, because all the *de minimis* factors must be satisfied, a person who enters into only a single swap or security-based swap, as a swap dealer, with a single counterparty could not qualify for the *de minimis* exemption if that swap or security-based swap exceeds the effective notional amount threshold.

⁴³ For this purpose, an affiliated group would be defined as any group of entities that is under common control and that reports information or prepares its financial statements on a consolidated basis.

⁴⁴ See proposed CEA rule 1.3(ppp)(4)(iv); proposed Exchange Act rule 3a71-2(d).

⁴⁵ For these purposes only, an amendment to an existing swap or security-based swap would not need to be counted as a new swap or security-based swap if the underlying item is substantially the same as the original item. This may occur, for example, to reflect the effect of a corporate action such as a merger. An amendment would be counted as a new swap or security-based swap, however, to

³⁵ The *de minimis* exemption specifically places limits on a person's dealing activity involving swaps or security-based swaps. Thus, these limits would not apply to swap or security-based swap activity that does not itself constitute dealing activity, such as activity in which a person hedges or mitigates a commercial risk of its business that is unrelated to a dealing business (*i.e.*, as discussed above, when the person did not accommodate demand from the other party, respond to the other party's interest in swaps or security-based swaps, solicit the other party, propose economic terms, intermediate between parties, provide liquidity, or engage in other dealing activities). See part II.A.2, *supra*.

³⁶ See proposed CEA rule 1.3(ppp)(4)(ii); proposed Exchange Act rule 3a71-2(a). To the extent that the stated notional amount of a swap or security-based swap is leveraged or enhanced by its structure, the calculation shall be based on the effective notional amount of the swap or security-based swap rather than on its stated notional amount.

³⁷ We preliminarily believe that activity above this amount would be sufficient to warrant dealer registration to bring about the benefits of such registration.

³⁸ Also, allowing offsets for collateral would result in a *de minimis* standard that could encompass positions of virtually unlimited size.

³⁹ The term "special entity" encompasses: Federal agencies; States, State agencies and political subdivisions (including cities, counties and municipalities); "employee benefit plans" as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"); "governmental plans" as defined under ERISA; and endowments.

⁴⁰ See proposed CEA rule 1.3(ppp)(4)(ii); proposed Exchange Act rule 3a71-2(b).

⁴¹ See proposed CEA rule 1.3(ppp)(4)(iii); proposed Exchange Act rule 3a71-2(c). That these tests measure the entity's activities over the prior

The proposed rule would not distinguish between different types of swaps or security-based swaps into which entities may enter (e.g., rate swaps versus other commodity swaps, or credit default swaps versus equity swaps). The Commissions preliminarily do not believe that the ceiling for distinguishing *de minimis* dealing activities from other dealing activities appropriately turns upon the particular type of swap or security-based swap.⁴⁶

The Commissions request comment on the proposed rule regarding the *de minimis* exemption. Commenters particularly are requested to address whether certain of the proposed factors should be modified or eliminated; for example, should the proposed \$100 million limit on annual notional swaps or security-based swaps entered into in a dealer capacity be raised or lowered to better implement the intended scope of the *de minimis* exemption—i.e., to exclude entities for which dealer regulation would not be warranted? Should we adopt different thresholds that would appropriately limit the exemption so it encompasses only those entities whose dealing activities are such that dealer regulation is not warranted? To what extent would certain entities be expected to reduce or otherwise adjust their dealing activity to fall within the scope of the *de minimis* exemption? Would there be any adverse implications for market participants if this happens? To what extent could the proposed factors potentially reduce dealing activity, and in doing so reduce the liquidity available in the swap or security-based swap market?

Commenters also are requested to address whether the rule should seek to identify only certain types of counterparties with which a person could engage in dealing activities under the exemption. We also particularly request comment on the proposed \$25 million notional threshold for dealer transactions with “special entities,” including whether that proposed threshold should be raised or lowered, and whether an entity that enters into dealing transactions with “special entities” should be able to take advantage of the exemption at all. In addition, we request comment on

whether the proposed threshold for transactions with “special entities” would provide a disincentive to dealers entering into transactions with such entities.

Commenters further are requested to address whether the factors may appropriately account for the size of the swap or security-based swap activities compared to the size of the entity; how an entity’s swaps or security-based swaps with affiliated counterparties should be treated for purposes of the test; and whether the exemption’s factors should vary depending on the type of swap or security-based swap at issue.

In addition, commenters are requested to address the significance of the fact that the statutory *de minimis* exemption specifically references transactions with or on behalf of a customer. Does that mean the exemption was intended to specifically address dealing activity as an accommodation to an entity’s customers? If so, should the exemption be conditioned on the presence of an existing relationship between the entity and the counterparty that does not entail swap or security-based swap dealing activity, and if so, which types of relationships should be treated as creating a “customer” relationship?

Commenters also are requested to address whether the *de minimis* exemption should excuse an entity from having to comply with certain regulatory requirements imposed on swap dealers or security-based swap dealers, while also mandating compliance with other dealer requirements. In addition, commenters are requested to address whether, in lieu of the self-executing approach proposed here, the Commissions instead should require that entities which seek relief under this *de minimis* exemption must submit exemptive requests to the relevant agency for the agency’s consideration and action. Commenters further are requested to address whether the proposed notional threshold for the *de minimis* exception should be subject to a formula that permits automatic periodic adjustments to the threshold, such as to reflect changes in market size or in the size of typical contracts.

C. Statutory Exclusion for Swaps in Connection With Originating a Loan

The “swap dealer” definition excludes an insured depository institution (“IDI”) “to the extent it offers to enter into a swap with a customer in connection with originating a loan with that customer.”⁴⁷ This exclusion does not

appear in the definition of “security-based swap dealer.”

1. Comments Regarding the Exclusion for Swaps in Connection With Loans

Three IDIs commented on this aspect of the definition, stating that the exclusion should encompass any swap entered into contemporaneously with a loan that is related to any of the borrower’s activities that affect the ability to repay the loan and can be hedged. Thus, in their view, the exclusion should cover exchange rate and physical commodity swaps in addition to interest rate swaps. The IDIs also said the exclusion should apply to amendments, restructurings and workouts of loans, and to lenders that act through a syndicate.

Another commenter expressed similar views, and also asked for clarification whether the exclusion applies to all aspects of the definition, or if it applies only to whether a person is commonly known in the trade as a swap dealer. The CFTC preliminarily believes the exclusion applies to all aspects of the swap dealer definition.

2. Proposed Rule Regarding the Exclusion for Swaps in Connection With Loans

The CFTC preliminarily interprets the word “offer” in this exclusion to include scenarios where the IDI requires the customer to enter into a swap, or the customer asks the IDI to enter into a swap, specifically in connection with a loan made by that IDI. Also, the proposed rule provides that, in order to prevent evasion, the statutory exclusion does not apply where (i) The purpose of the swap is not linked to the financial terms of the loan; (ii) the IDI enters into a “sham” loan; or (iii) the purported “loan” is actually a synthetic loan such as a loan credit default swap or loan total return swap.

The proposed rule would apply the statutory exclusion only to swaps that are connected to the financial terms of the loan, such as, for example, its duration, interest rate, currency or principal amount. Although commenters urged that this exclusion be extended to other aspects of the lending relationship, we preliminarily believe that it would not be appropriate that this exclusion from the swap dealer definition encompass swaps that are connected to the borrower’s other business activities, even if the loan agreement requires that the borrower enter into such swaps or otherwise refers to them. We preliminarily believe that a broader reading of the exclusion could encompass all swap activity

the extent that the change in the underlying item modifies the economic risk reflected by the swap or security-based swap.

⁴⁶ The Exchange Act’s definition of “dealer” does not include a *de minimis* exemption. Thus, an entity that engages in dealing activity involving securities (other than security-based swaps with eligible contract participants) would be required to register as a “dealer” under the Exchange Act, and comply with the Exchange Act’s requirements applicable to dealers, absent some other exception or exemption from registration.

⁴⁷ See CEA section 1a(49)(A).

between an IDI and its borrowers, which we do not think is intended.

The origination of commercial loans is a complex process, and the CFTC preliminarily believes that this exclusion should be available to all IDIs that are a source of funds to a borrower. For example, all IDIs that are part of a loan syndicate providing a loan to a borrower could claim this exclusion with respect to swaps entered into with the borrower that are connected to the financial terms of the loan. Similarly, the proposed exclusion could be claimed with respect to such swaps entered into by any IDI that participates in or obtains a participation in such loan by means of a transfer or otherwise.⁴⁸ Also, an IDI that is a source of funds for the refinancing of a loan (whether directly or through a syndicate, participation or otherwise) could claim the exclusion if it enters into a swap with the refinancing borrower.

We emphasize that this proposed exclusion, by its statutory terms, is available only to IDIs. If an IDI were to transfer its participation in a loan to a non-IDI, then the non-IDI would not be able to claim this exclusion, regardless of the terms of the loan or the manner of the transfer. Similarly, a non-IDI that is part of a loan syndicate with IDIs would not be able to claim the exclusion.

In sum, the proposed exclusion may be claimed by a person that meets the following three conditions: (i) The person is an IDI; (ii) the person is the source of funds to a borrower in connection with a loan (either directly or through syndication, participation, refinancing or otherwise); and (iii) the person enters into a swap with the borrower that is connected to the financial terms of the loan (so long as the loan is not a sham or a synthetic loan).

The CFTC requests comment on the proposed rule relating to the statutory exclusion for swaps in connection with originating a loan, and in particular on whether this statutory exclusion should be extended beyond swaps that are connected to the financial terms of the loan, and if so, why. The CFTC also requests comment on whether this exclusion should apply only to swaps that are entered into contemporaneously with the IDI's origination of the loan (and if so, how "contemporaneously" should be defined for this purpose), or

whether this exclusion should also apply to swaps entered into during part or all of the duration of the loan.

D. Designation as a Dealer for Certain Types, Classes, or Categories of Swaps, Security-Based Swaps, or Activities

The statutory definitions include a provision stating that a person may be designated as a dealer for one or more types, classes or categories of swaps, security-based swaps, or activities without being considered a swap dealer or security-based swap dealer for other types, classes or categories of swaps, security-based swaps, or activities. This provision is permissive and does not require the Commissions to designate persons as dealers for only a limited set of types, classes or categories of swaps, security-based swaps, or activities.

1. Comments Regarding Limited Designation as a Swap Dealer or Security-Based Swap Dealer

One commenter stated that the Commissions should allow a person to register as a swap dealer or security-based swap dealer for only a limited set of types, classes or categories of swaps or security-based swaps. Another commenter expressed the view that a person designated as a swap dealer or security-based swap dealer should be designated as such for all types of swaps or security-based swaps, respectively.

2. Proposed Rule Regarding Limited Designation as a Swap Dealer or Security-Based Swap Dealer

In general, the Commissions propose that a person that satisfies the definition of swap dealer or security-based swap dealer would be a dealer for all types, classes or categories of swaps or security-based swaps, or activities involving swaps or security-based swaps, in which the person engages.⁴⁹ Thus, the person would be subject to all regulatory requirements applicable to dealers for all swaps or security-based swaps into which it enters. We propose this approach because it may be difficult for swap dealers and security-based swap dealers to separate their dealing activities from their other activities involving swaps or security-based swaps.⁵⁰

The proposed rule also states, however, that the Commissions may provide for a person to be designated as a swap dealer or security-based swap

dealer for only specified categories of swaps, security-based swaps, or activities, without being classified as a dealer for all categories.⁵¹ This proposed rule would afford persons an opportunity to seek, on an appropriate showing, a limited designation based on facts and circumstances applicable to their particular activities. The Commissions anticipate that a swap dealer could seek a limited designation at the same time as, or at a later time subsequent to, the person's initial registration as a swap dealer.

The CFTC understands that there may potentially be non-financial entities, such as physical commodity firms, that conduct swap dealing activity through a division of the entity, and not a separately-incorporated subsidiary. In these instances, the entity's swap dealing activity would not be a core component of the entity's overall business. If this type of entity registered as a swap dealer, the CFTC anticipates that certain swap dealer requirements would apply to the swap dealing activities of the division, but not necessarily to the swap activities of other parts of the entity.

The Commissions request comment on the proposed rules regarding limited designation as a swap dealer or security-based swap dealer. Commenters particularly are requested to address the circumstances in which such limited purpose designations would be appropriate, the factors that the Commissions should consider when addressing such requests, and the type of information requestors should provide in support of their request. For example, would it be appropriate to grant such limited purpose designations only to entities that do not otherwise fall within the definition of a financial entity, and whose dealing activity is below a defined threshold of the entity's overall activity? At what level should the Commissions set such a threshold? Which of the requirements applicable to dealers should or should not apply to such entity's non-dealing activities in swaps and security-based swaps?

In addition, commenters are requested to address whether the Commissions should provide for limited purpose designations of swap dealers or security-based swap dealers through some other mechanism as an alternative to, or in

⁴⁸ The CFTC preliminarily believes that the proposed exclusion could be claimed by any IDI that participates in a loan through any means that involves a payment to a lender to take the place of that lender, including an "English style" participation.

⁴⁹ See proposed CEA rule 1.3(ppp)(3); proposed Exchange Act rule 3a71-1(c).

⁵⁰ For example, in order to efficiently impose the dealer requirements on only the person's dealing activities, it may be necessary for the person to have separate books and records and a separate compliance regime for its dealing activities.

⁵¹ CEA section 1a(49)(B); Exchange Act section 3(a)(71)(B). As discussed below, the Commissions preliminarily believe that there are four major categories of swaps and two major categories of security-based swaps. See part IV.A, *infra*. The designation as a swap dealer or security-based swap dealer may, for example, be limited in terms of these categories or in terms of particular activities of the person.

addition to, case-by-case evaluations of individual applications. If so, what criteria and procedures would be appropriate for making limited purpose designations through this type of approach? Also, should the limited purpose designation apply on a provisional basis starting at the time that the entity makes an application for a limited purpose designation?

Finally, commenters also are asked to address whether such limited purpose designations should be conditioned in any way, such as by the provision of information of the type that would be required with respect to an entity's swaps or security-based swaps involving the particular category or activity for which they are not designated as a dealer.

E. Certain Interpretative Issues

1. Affiliate Issues

We preliminarily believe that the word "person" in the swap dealer and security-based swap dealer definitions should be interpreted to mean that the designation applies with respect to a particular legal person. That is, for example, we would not view a trading desk or other discrete business unit that is not a separately organized legal person as a swap dealer; rather, the legal person of which it is a part would be the swap dealer. Also, an affiliated group of legal persons under common control could include more than one dealer. Within such a group, any legal person that engages in swap or security-based swap dealing activities would be a swap dealer or security-based swap dealer, as applicable.

In determining whether a particular legal person is a swap dealer or security-based swap dealer, we preliminarily believe it would be appropriate for the person to consider the economic reality of any swaps and security-based swaps it enters into with affiliates (*i.e.*, legal persons under common control with the person at issue), including whether those swaps and security-based swaps simply represent an allocation of risk within a corporate group.⁵² Swaps and security-based swaps between persons under common control may not involve the interaction with unaffiliated persons that we believe is a hallmark of the elements of the definitions that refer to holding oneself out as a dealer or being

commonly known as a dealer. To the extent, however, that an entity seeks to use transactions between persons under common control to avoid one of the dealer definitions, the Commissions have the authority to prohibit practices designed to evade the requirements applicable to swap dealers and security-based swap dealers.⁵³

The Commissions invite comment as to how the swap dealer and security-based swap dealer definitions should be applied to members of an affiliated group. Commenters particularly are invited to address how the Commissions should interpret common control for these purposes, and whether this interpretation should be limited to wholly-owned affiliates.

2. Application to Particular Swap Markets

The swap markets are diverse and encompass a variety of situations in which parties enter into swaps with each other. We believe it is helpful to the understanding of the rule to discuss some of these situations, particularly those that have been raised by commenters, here. The situations discussed below include persons who enter into swaps as aggregators, as part of their participation in physical markets, or in connection with the generation and transmission of electricity. We invite comment as to what aspects of the parties' conduct in these situations should, or should not, be considered swap dealing activities, and whether the parties involved in these situations are swap dealers.

a. Aggregators

Commenters explained that some persons enter into swaps with other parties in order to aggregate the swap positions of the other parties into a size that would be more amenable to entering into swaps in the larger swap market, or otherwise to make entering into such swaps more efficient. For example, certain cooperatives enter into swaps with smaller cooperatives, smaller businesses or their members in order to establish a position in a commodity that is large enough to be traded on a swap or futures market. Similarly, one smaller financial institution explained that it enters into swaps with counterparties whose swap positions would not be large enough to be of interest to larger financial

institutions. This institution stated that it enters into offsetting swaps with larger financial institutions so that it is in a neutral position between the counterparties and the larger financial institutions.

The result of these arrangements is that such persons engage in activities that are similar in many respects to those of a swap dealer as set out in the definition—the person enters into swaps to accommodate demand from other parties, it enters into swaps with a relatively large number of non-dealers, and it holds itself out as willing to enter into swaps. It may be that the swap dealing activities of these aggregators would not exceed the *de minimis* threshold, and therefore they would not be swap dealers. The CFTC, in particular, requests comment as to how the *de minimis* threshold would apply to such persons. If their activity would exceed the *de minimis* threshold set forth in the proposed rule, the Commissions request comment on the application of the swap dealer definition to their activity.

b. Physical Market Participants

The markets in physical commodities such as oil, natural gas, chemicals and metals are complex and varied. They involve a large number of market participants that, over time, have developed highly customized transactions and market practices that facilitate efficiencies in their market in unique ways. Some of these transactions would be encompassed by the statutory definition of "swap," and some participants in these markets engage in swap dealing activities that are above the proposed *de minimis* threshold. The Commissions invite comment as to any different or additional factors that should be considered in applying the swap dealer definition to participants in these markets.

c. Electricity Generation and Transmission

The use of swaps in the generation and transmission of electricity is highly complex because electricity cannot be stored and therefore is generated, transmitted and used on a continuous, real-time basis. Also, the number and variety of participants in the electricity market is very large and some electricity services are provided as a public good rather than for profit. Nevertheless, some participants engage in swap dealing activities as described above that are above the *de minimis* threshold set forth in the proposed rule. The Commissions invite comment as to any different or additional factors that should be considered in applying the

⁵² Such swaps and security-based swaps should be considered in this way only for purposes of determining whether a particular person is a swap dealer or security-based swap dealer and does not necessarily apply in the context of the Exchange Act's general definition of "dealer." The swaps and security-based swaps, moreover, would continue to be subject to all laws and requirements applicable to such swaps and security-based swaps.

⁵³ See Dodd-Frank Act sections 721(b)(2), 761(b)(3). For example, it would not be permissible for an entity that provides liquidity on one side of the market to use affiliated entities to provide liquidity on the other side in an attempt to avoid having to register as a swap or security-based swap dealer.

swap dealer definition to participants in the generation and transmission of electricity. Specifically, the Commissions invite comment on whether there are special considerations, including without limitation special considerations arising from section 201(f) of the Federal Power Act, related to non-profit, public power systems such as rural electric cooperatives and entities operating as political subdivisions of a State, and the applicability of the exemptive authority in section 722(f) of the Dodd-Frank Act to address those considerations.

III. Amendments to Definition of Eligible Contract Participant

A. Overview

The Commodity Futures Modernization Act of 2000 ("CFMA")⁵⁴ generally excluded or exempted transactions between eligible contract participants ("ECPs") from most provisions of the CEA.⁵⁵ Section 723(a)(1)(A) of the Dodd-Frank Act repeals those exclusions and exemptions. ECP status remains important, however, because Section 723(a)(2) of the Dodd-Frank Act renders it unlawful for a non-ECP to enter into a swap other than on, or subject to the rules of, a designated contract market ("DCM").⁵⁶ Section 763(e) of the Dodd-Frank Act also renders it unlawful for a non-ECP to enter into a security-based swap unless such transaction is effected on a national securities exchange registered pursuant to Section 6(b) of the Exchange Act.⁵⁷ In addition, Section 768(b) of the Dodd-Frank Act makes it

unlawful for a non-ECP to enter into a security-based swap unless a registration statement is in effect. While this means that non-ECPs cannot enter into swaps on SEFs or on a bilateral, off-exchange basis, it also opens swaps to non-ECPs, so long as the swaps are entered into on, or subject to the rules of, a DCM. Similarly, while non-ECPs cannot enter into security-based swaps unless the transaction is effected on a national securities exchange and the security-based swap has an effective registration statement, it also opens security-based swaps to non-ECPs.

Congress also amended⁵⁸ the ECP definition in Section 721(a)(9) of the Dodd-Frank Act by: (1) Raising a threshold that governmental entities may use to qualify as ECPs, in certain situations, from \$25 million in discretionary investments to \$50 million in such investments; and (2) replacing the "total asset" standard for individuals to qualify as ECPs with a discretionary investment standard.⁵⁹

B. Commenters' Views

The ECP definition elicited comment from nine commenters. The comments ranged from requests not to increase the monetary thresholds for governmental employee benefit plans in certain instances to suggestions to dramatically raise them across the board, and from requests not to change the definition in a way that would limit the commenter's access to swaps to specific proposals to address such otherwise limited access.

In the Dodd-Frank Act, Congress addressed aspects of the ECP definition that it found to be of particular concern regarding governmental entities and individuals. Otherwise, though, persons who qualified for exclusions or exemptions to enter into bilateral, off-exchange swaps prior to the Dodd-Frank Act will still qualify to do so with respect to non-standardized swaps under the Dodd-Frank Act, with the exceptions discussed below. We have not identified any legislative history

suggesting that Congress intended the Commissions to undertake a wholesale revision of the ECP definition.

Accordingly, the Commissions are limiting the further definition of the term ECP to the discrete issues discussed below.

C. New ECP categories

The CEA definition of ECP generally is comprised of regulated persons;⁶⁰ entities defined as ECPs based on a total asset test (e.g., a corporation, partnership, proprietorship, organization, trust, or other entity with total assets exceeding \$10 million)⁶¹ or an alternative monetary test coupled with a non-monetary component (e.g., an entity with a net worth in excess of \$1 million and engaging in business-related hedging;⁶² or certain employee benefit plans, the investment decisions of which are made by one of four enumerated types of regulated entities⁶³); and certain governmental entities and individuals that meet defined thresholds.⁶⁴

Persons in the new major swap participant, major security-based swap participant, swap dealer and security-based swap dealer categories are likely to be among the most active and largest users of swaps and security-based swaps. Accordingly, the Commissions propose to further define the term ECP to include these new categories, which will permit such persons to enter into swaps and security-based swaps on SEFs and on a bilateral basis (where otherwise permitted under the Dodd-Frank Act and regulations thereunder).

We seek comment on this proposed expansion of the ECP definition.

D. Relationship Between Retail Foreign Currency and ECP Status in the Context of a Commodity Pool

Prior to the Dodd-Frank Act, clause (A)(iv) of the ECP definition provided that a commodity pool was an ECP if the pool and its operator met certain requirements (i.e., the commodity pool has \$5 million in total assets and is operated by a commodity pool operator regulated under the CEA or subject to

⁵⁴ Public Law 106-554, 114 Stat. 2763 (Dec. 21, 2000).

⁵⁵ See CEA sections 2(d) (Excluded Derivative Transactions), 2(e) (Excluded Electronic Trading Facilities), 2(g) (Excluded Swap Transactions) and 2(h) (Legal Certainty for Certain Transactions in Exempt Commodities) (7 U.S.C. 2(d), (e), (g), (h)). The CFMA also excluded swap agreements from the definitions of "security" in Section 3(a)(10) of the Exchange Act and Section 2(a)(1) of the Securities Act. See Section 3A of the Exchange Act, 15 U.S.C. 78c-1, and Section 2A of the Securities Act, 15 U.S.C. 77b-1 (both of which have been modified by the Dodd-Frank Act). The CFMA, however, provided that the SEC had antifraud authority over security-based swap agreements.

⁵⁶ Section 723(a)(2) of the Dodd-Frank Act adds new subsection (e) to CEA section 2 (7 U.S.C. 2(e)). New CEA section 2(e) provides that "[i]t shall be unlawful for any person, other than an eligible contract participant, to enter into a swap unless the swap is entered into on, or subject to the rules of, a board of trade designated as a contract market under section 5."

⁵⁷ Section 763(e) of the Dodd-Frank Act adds paragraph (l) to Exchange Act section 6. New Exchange section 6(l) provides that "[i]t shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange registered pursuant to subsection (b)."

⁵⁸ The changes to the ECP definition made by the Dodd-Frank Act originated in the Administration's "White Paper" on financial regulatory reform. See Financial Regulatory Reform, A New Foundation: Rebuilding Financial Supervision and Regulation, available at http://www.financialstability.gov/docs/regs/FinalReprot_web.pdf, at 48-49 (June 17, 2009) ("Current law seeks to protect unsophisticated parties from entering into inappropriate derivatives transactions by limiting the types of counterparties that could participate in those markets. But the limits are not sufficiently stringent.").

⁵⁹ The monetary component of ECP status for individuals remains the same under the amended ECP definition: More than \$10 million (but now in discretionary investments, not in total assets), or \$5 million if the transactions for which ECP status is necessary are for risk management of an asset or liability the individual owns or incurs, or is reasonably likely to own or incur.

⁶⁰ CEA section 1a(18)(A)(i), (ii), (iii), (iv), (viii), (ix), (x) 7 U.S.C. 1a(18)(A)(i), (ii), (iii), (iv), (viii), (ix), (x)), as redesignated by Section 721(a)(9) of the Dodd-Frank Act.

⁶¹ CEA section 1a(18)(A)(v)(I) (7 U.S.C. 1a(18)(A)(v)(I)), as redesignated by Section 721(a)(9) of the Dodd-Frank Act.

⁶² CEA section 1a(18)(A)(v)(III) (7 U.S.C. 1a(18)(A)(v)(III)), as redesignated by Section 721(a)(9) of the Dodd-Frank Act.

⁶³ CEA section 1a(18)(A)(vi) (7 U.S.C. 1a(18)(A)(vi)), as redesignated by Section 721(a)(9) of the Dodd-Frank Act.

⁶⁴ CEA sections 1a(18)(A)(vii) and (xi) (7 U.S.C. 1a(18)(A)(vii) and (xi)), as redesignated by Section 721(a)(9) of the Dodd-Frank Act.

foreign regulation), regardless of whether each pool participant was itself an ECP.⁶⁵ Section 741(b)(10) of the Dodd-Frank Act amended clause (A)(iv) of the ECP definition to provide that a commodity pool engaging in retail foreign currency transactions of the type described in CEA sections 2(c)(2)(B) or 2(c)(2)(C);⁶⁶ (“retail forex”) and such pools, “Retail Forex Pools”) no longer qualifies as an ECP for those purposes if any participant in the pool is not independently an ECP. The Commissions believe that in some cases commodity pools unable to satisfy the conditions of clause (A)(iv) of the ECP definition may rely on clause (A)(v) to qualify as ECPs instead for purposes of retail forex. Clause (A)(v) of the ECP definition applies to business entities irrespective of their form of organization (*i.e.*, corporations, partnerships, proprietorships, organizations, trusts and other entities), and contains a \$1 million net worth test where such an entity “enters into an agreement, contract, or transaction in connection with the conduct of the entity’s business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity’s business.”⁶⁷

The Commissions believe that permitting Retail Forex Pools with one or more non-ECP participants to achieve ECP status by relying on clause (A)(v) of the ECP definition would frustrate the intent of Congress in denying ECP status to Retail Forex Pools under clause (A)(iv). Consequently, the Commissions propose to further define the term ECP to preclude a Retail Forex Pool with one or more non-ECP participants from qualifying as an ECP by relying on clause (A)(v) of the ECP definition if such Retail Forex Pool is not an ECP due to the language added to clause (A)(iv) of the ECP definition by section 741(b)(10) of the Dodd-Frank Act (*i.e.*, because the pool contains one or more non-ECP participants). Because commodity pools can be structured in various ways and can have one or more feeder funds and/or pools, many with

their own participants, the Commissions propose to preclude a Retail Forex Pool from being an ECP pursuant to clause (A)(iv) of the ECP definition if there is a non-ECP participant at any investment level (*e.g.*, a participant in the pool itself (a direct participant), an investor or participant in a fund or pool that invests in the pool in question (an indirect participant), an investor or participant in a fund or pool that invests in that investor fund or pool (also an indirect participant), *etc.*).

Similarly, the Commissions believe that some commodity pools unable to satisfy the total asset or regulated status components of clause (A)(iv) of the ECP definition may rely on clause (A)(v) to qualify as ECPs instead. The Commissions are of the view that a commodity pool that cannot satisfy the monetary and regulatory status conditions prescribed in clause (A)(iv) should not qualify as an ECP in reliance on clause (A)(v) of the ECP definition. Therefore, the Commissions propose to further define the term ECP to prevent such an entity from qualifying as an ECP pursuant to clause (A)(v) of the ECP definition.

E. Request for comment

The Commissions request comment on all aspects of the proposed amendments to the definition of “eligible contract participant.” Are the proposed interpretations with respect to Retail Forex Pools and other commodity pools appropriate? Do entities described in the various enumerated ECP categories (other than commodity pools) rely on clause (A)(v) to qualify as ECPs? If so, should an entity that would be described in one of the clauses of paragraph (A) of the ECP definition, but cannot satisfy the conditions prescribed in that clause, be prohibited from relying on clause (A)(v) of the ECP definition?

In addition, should the Commissions further narrow any or all of the ECP categories? Why or why not? If so, what additional conditions would be appropriate? Should the Commissions define the term “discretionary basis,” as requested by one commenter, either solely for purposes of clause (A)(vii) or clause (A)(xi), or for both clauses? Alternatively, should the Commissions add any additional categories of ECPs, such as the following categories suggested by commenters: Commercial real estate developers; energy or agricultural cooperatives or their members; or firms using swaps as hedges pursuant to the terms of the CFTC’s Swap Policy Statement? If so, which ones and why?

IV. Definitions of “Major Swap Participant” and “Major Security-Based Swap Participant”

The definitions of “major swap participant” and “major security-based swap participant” (also jointly referred to as the “major participant” definitions) respectively focus on the market impacts and risks associated with an entity’s swap and security-based swap positions. In this respect, the major participant definitions differ from the definitions of “swap dealer” and “security-based swap dealer,” which focus on an entity’s activities and account for the amount or significance of those activities only in the context of the *de minimis* exception.

Despite those differences in focus, persons that meet the major participant definitions in large part must follow the same statutory requirements that apply to swap dealers and security-based swap dealers.⁶⁸ In this way, the statute applies comprehensive regulation to entities whose swap or security-based swap activities do not cause them to be dealers, but nonetheless could pose a high degree of risk to the U.S. financial system generally.⁶⁹

The major participant definitions are similar in their key provisions, although one exception, as discussed below, is available only in connection with the “major swap participant” definition. Both major participant definitions encompass persons that satisfy any of three alternative tests:⁷⁰

- The first test encompasses persons that maintain a “substantial position” in any of the “major” categories of swaps or security-based swaps, as those categories are determined by the CFTC

⁶⁸ In particular, under CEA section 4s and Exchange Act section 15F, dealers and major participants in swaps or security-based swaps generally are subject to the same types of margin, capital, business conduct and certain other requirements, unless an exclusion applies. *See* CEA section 4s(h)(4), (5); Exchange Act section 15F(h)(4), (5).

⁶⁹ As discussed below, the tests of the major participant definitions use terms—particularly “systemically important,” “significantly impact the financial system” or “create substantial counterparty exposure”—that denote a focus on entities that pose a high degree of risk through their swap and security-based swap activities. In addition, the link between the major participant definition and risk was highlighted during the Congressional debate on the statute. *See* 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (dialogue between Senators Hagen and Lincoln, discussing how the goal of the major participant definition was to “focus on risk factors that contributed to the recent financial crisis, such as excessive leverage, under-collateralization of swap positions, and a lack of information about the aggregate size of positions”).

⁷⁰ Also, neither major participant definition encompasses an entity that meets the respective swap dealer or security-based swap dealer definition. *See* CEA section 1a(33)(A); Exchange Act section 3(a)(67)(A)(i).

⁶⁵ CEA section 1a(12)(A)(iv) (7 U.S.C. 1a(12)(A)(iv)).

⁶⁶ 7 U.S.C. 2(c)(2)(B) and (C). *See generally* “Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,” 75 FR 55410 (Final Rule; Sept. 10, 2010) (discussing the new CFTC retail forex regulatory regime); “Regulation of Off-Exchange Retail Foreign Exchange Transactions and Intermediaries,” 75 FR 3282 (Proposed Rule; Jan. 20, 2010) (providing historical background on the regulation of retail forex transactions).

⁶⁷ CEA section 1a(18)(A)(v) (7 U.S.C. 1a(18)(A)(v)), as redesignated by Section 721(a)(9) of the Dodd-Frank Act.

or SEC as applicable. This test excludes both “positions held for hedging or mitigating commercial risk,” and positions maintained by or contracts held by any employee benefit plan (as defined in paragraphs (3) and (32) of section 3 of ERISA (29 U.S.C. 1002)) for the primary purpose of hedging or mitigating risks directly associated with the operation of the plan.⁷¹

- The second test encompasses persons whose outstanding swaps or security-based swaps create “substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets.”⁷²

- The third test encompasses any “financial entity” that is “highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency” and that maintains a “substantial position” in swaps or security-based swaps for any of the “major” categories of swaps or security-based swaps.⁷³

The statute directs the CFTC or the SEC to define “substantial position” for the respective definition at the threshold that it determines to be “prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.” The definitions further provide that when defining “substantial position,” the CFTC or SEC “shall consider the person’s relative position in uncleared as opposed to cleared [swaps or security-based swaps] and may take into consideration the value and quality of collateral held against counterparty exposures.”⁷⁴

Both major participant definitions provide that a person may be designated as a major participant for one or more categories of swaps or security-based swaps without being classified as a major participant for all classes of swaps or security-based swaps.⁷⁵

Finally, the definition of “major swap participant”—but not the definition of “major security-based swap participant”—includes an exception for any “entity whose primary business is providing financing, and uses derivatives for the purpose of hedging

underlying commercial risks related to interest rate and foreign currency exposures, 90 percent or more of which arise from financing that facilitates the purchase or lease of products, 90 percent or more of which are manufactured by the parent company or another subsidiary of the parent company.”⁷⁶

Although the two major participant definitions are similar, they address instruments that reflect different types of risks and that can be used by end-users and other market participants for different purposes. Interpretation of the definitions must appropriately account for those differences.

The Commissions are proposing rules to further define the “major swap participant” and “major security-based swap participant” definitions, by specifically addressing: (a) The “major” categories of swaps or securities-based swaps; (b) the meaning of “substantial position”; (c) the meaning of “hedging or mitigating commercial risk”; (d) the meaning of “substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets”; and (e) the meanings of “financial entity” and “highly leveraged.” We also are proposing rules to specify the use of a daily average methodology for identifying whether a person meets one of the major participant definitions, provide for a reevaluation period for certain entities that exceed the relevant daily average by a small amount, and provide for a minimum length of time before a person may no longer be deemed a major participant.

We further propose that the CFTC or SEC may limit an entity’s designation as a major participant to only certain types, classes or categories of swaps or security-based swaps. We also address certain additional interpretive issues that commenters have raised. Finally, while the Commissions also are not proposing any exclusions from the major participant definitions, we are soliciting comment as to whether certain types of entities should be excluded from the definitions’ application.⁷⁷

⁷⁶ See CEA section 1a(33)(D).

⁷⁷ In light of the significant and novel issues raised by the major participant definitions, the Commissions recognize the importance of monitoring the swap and security-based swap markets following adoption of major participant rules. This will help us evaluate whether the rules appropriately reflect how market participants use these instruments, and will help us consider the impact of market evolution and the ways in which market participants may change their practices in response to the rules, so we may identify potential improvements to the rules or other actions to

A. “Major” Categories of Swaps and Securities-Based Swaps

The first and third tests of the statutory major participant definitions encompass entities that have a substantial position in a “major” category of swaps or security-based swaps. The Commissions are responsible for designating these “major” categories.⁷⁸

The Commissions propose to designate “major” categories of swaps and security-based swaps in a manner that reflects the risk profiles of these various instruments and the different purposes for which end-users make use of the various instruments. We preliminarily believe that it is important not to parse these “major” categories so finely as to base the “substantial position” thresholds on unduly narrow risks that would reduce those thresholds’ effectiveness as risk measures. The “major” categories will apply only for purposes of the major participant definitions and are not necessarily determinative with respect to any other provision of the Dodd-Frank Act or the regulations adopted thereunder.

1. Major Categories of Swaps

We propose to designate four “major” categories of swaps for purposes of the “major swap participant” definition. The four categories are rate swaps, credit swaps, equity swaps and other commodity swaps.⁷⁹ The first category would encompass any swap which is primarily based on one or more reference rates, such as swaps of payments determined by fixed and floating interest rates, currency exchange rates, inflation rates or other monetary rates. The second category would encompass any swap that is primarily based on instruments of indebtedness, including but not limited to any swap primarily based on one or more indices related to debt instruments, or any swap that is an index credit default swap or total return

enhance enforcement of major participant regulation.

⁷⁸ See CEA section 1a(33)(A)(i), (iii); Exchange Act section 3(a)(67)(a)(2)(i), (iii). One commenter suggested that we determine these categories by reference to the types of instruments specifically listed in the statutory definition of “swap.” See Northwestern Mutual letter (suggesting that, for regulatory consistency, each type of swap listed in the definition and options on each of those swaps should be considered to be an individual major category). The statutory definition of “swap” lists 22 different types of swaps.

⁷⁹ See proposed CEA rule 1.3(rrr). For the avoidance of doubt, the term “swap” as it is used in the definitions of the major swap categories in rule 1.3(rrr) has the meaning set forth in section 1a(47) of the CEA and the rules promulgated thereunder.

⁷¹ See CEA section 1a(33)(A)(i); Exchange Act section 3(a)(67)(A)(ii)(I).

⁷² See CEA section 1a(33)(A)(ii); Exchange Act section 3(a)(67)(A)(ii)(II).

⁷³ See CEA section 1a(33)(A)(iii); Exchange Act section 3(a)(67)(A)(ii)(III).

⁷⁴ See CEA Section 1a(33)(B); Exchange Act section 3(a)(67)(B).

⁷⁵ See CEA section 1a(33)(C); Exchange Act section 3(a)(67)(C).

swap on one or more indices of debt instruments. The third category would encompass any swap that is primarily based on equity securities, such as any swap primarily based on one or more indices of equity securities, or any total return swap on one or more equity indices. The fourth category would encompass any swap not included in any of the first three categories. This fourth category would generally include, for example and not by way of limitation, any swap for which the primary underlying item is a physical commodity or the price or any other aspect of a physical commodity.⁸⁰

The four major categories of swaps are intended to cover all swaps. Each swap would be in the category that most closely describes the primary item underlying the swap. If a swap is based on more than one underlying item of different types, the swap would be in the category that describes the underlying item that is likely to have the most significant effect on the economic return of the swap. The proposed categories are consistent with market statistics that distinguish between these general types of swaps, as well as market infrastructures that have been established for these types of swaps.

We request comment on this proposed method of allocating swaps among “major” categories. Commenters particularly are asked to address whether there are any types of swaps that would have unclear status under this proposal, as well as whether all swaps instead should be placed into a single “major” category for purposes of the “major swap participant” definition, or whether there should be additional “major” categories of swaps. Commenters are also asked to address whether the rate swap category should be divided into two separate categories—one for swaps based on rates of exchange between different currencies, and another for swaps based on interest rates, inflation rates and other monetary rates—and if so, in which category cross-currency rate swaps should be included. Also, should the major swap category for other commodity swaps be divided into two separate categories—one for swaps based on agricultural commodities, and another for swaps based on all other

commodities not included in the other categories?

2. Major Categories of Security-Based Swaps

We propose to designate two “major” categories of security-based swaps for purposes of the “major security-based swap definition.” The first category would encompass any security-based swap that is based, in whole or in part, on one or more instruments of indebtedness (including loans), or a credit event relating to one or more issuers or securities, including but not limited to any security-based swap that is a credit default swap, total return swap on one or more debt instruments, debt swap, debt index swap, or credit spread.⁸¹ The second category would encompass any other security-based swaps not included in the first category; this category would include, for example, equity swaps.⁸²

The proposed categories reflect the fact that entities that transact in security-based swaps for non-speculative purposes would be expected to use the respective instruments for different purposes. For example, swaps based on instruments of indebtedness, such as credit derivatives, can be used to hedge the risks associated with the default of a counterparty or debt obligation. Equity swaps can be used, among other ways, to hedge the risks associated with equity ownership or gain synthetic exposure to equities.⁸³ The proposed categories also are consistent with market statistics that currently distinguish between those general types of security-based swaps, as well as market infrastructures, including separate trade warehouses, that have been established for credit default swaps and equity swaps.

We request comment on this proposed method of allocating security-based swaps between two “major” categories. In particular, we request comment on whether there are any types of security-based swaps that would have unclear status under this proposal, as well as whether all security-based swaps instead should be placed into a single “major” category for purposes of the “major security-based swap participant” definition, or whether there should be

additional “major” categories of security-based swaps.

B. “Substantial Position”

As noted above, the Commissions are required to define the term “substantial position” as a threshold that is “prudent for the effective monitoring, management, and oversight of entities that are systemically important or can significantly impact the financial system of the United States.”⁸⁴ This raises two fundamental issues: (i) What types of measures should be used to identify the risks posed by an entity’s swap or security-based swap positions; and (ii) for each of those measures, how much risk should be required to evidence a “substantial position”?

1. Commenters’ Views

Commenters have expressed diverse views as to what should constitute a substantial position. A number of commenters suggested the use of a test based on the current uncollateralized mark-to-market exposure posed by an entity’s swap or security-based swap positions, after taking bilateral netting agreements into account. Two commenters suggested specific dollar amounts of uncollateralized exposure to use as the substantial position threshold.⁸⁵ Several commenters expressed the view that positions subject to central clearing should be entirely excluded from the analysis, or at least should be discounted for purposes of the analysis.⁸⁶

Some commenters opposed using the notional amount of swap or security-based swap positions to set the threshold, stating that the notional amount is not indicative of the risks associated with a position. Some commenters similarly opposed using measures of swap or security-based swap volume to set the threshold,

⁸⁴ See CEA section 1a(33)(B); Exchange Act section 3(a)(67)(B).

⁸⁵ See letter from Timothy W. Cameron, Esq., Managing Director, SIFMA Asset Management Group, dated September 20, 2010 (“SIFMA AMG letter”) (suggesting a standard of \$2.5 billion average exposure in any calendar quarter based on the entity’s entire portfolio of swaps and security-based swaps, other than foreign exchange swaps and forwards); letter from Gus Sauter, Chief Investment Officer, Vanguard, dated September 20, 2010 (“Vanguard letter”) (suggesting that the applicable threshold be \$500 million in uncollateralized exposure for any single major swap category or \$1 billion aggregate exposure across all major categories).

⁸⁶ See letter from Jennifer J. Kalb, Associate General Counsel, Metropolitan Life Insurance Company, dated September 20, 2010 (“MetLife letter”) (suggesting that cleared trades be subject to a lesser “charge” for purposes of the substantial position calculation, or be excluded entirely).

⁸⁰ The term “commodity” as defined in Section 1a(9) of the CEA, 7 U.S.C. 1a(9), and CFTC Rule § 1.3(e), 17 CFR 1.3(e) includes interest rates, foreign exchange rates, and equity and debt indices as well as physical commodities. Thus, the fourth category of swaps is entitled “other commodity swaps” because it includes any swap not included in the other three categories.

⁸¹ This category does not encompass a security-based swap that is based on an instrument of indebtedness solely in connection with the swap’s financing leg.

⁸² See proposed Exchange Act rule 3a67–2.

⁸³ At the same time, we note that the distinctions between these proposed “major” categories of “security-based swaps” arguably are less significant than the distinctions among the proposed major categories of “swaps” (such as, for example, the distinction between other commodity swaps and rate swaps).

contending that the number of trades does not reflect risk.⁸⁷

A few commenters addressed the possibility that the threshold could take into account the potential future risks associated with a position, in addition to the risks associated with uncollateralized current exposure.⁸⁸ Some commenters suggested that the threshold take into account the potential riskiness of the particular type of instrument at issue. Some commenters maintained that the threshold should take into account the number of counterparties an entity has, the size of an entity's positions compared to the size of the market, the size of an entity's swap or security-based swap positions compared to the entity's ability to absorb losses of that magnitude, or the financial strength of an entity's counterparties. Several commenters stated that the threshold should be based on an average measure over time, so that short-term spikes in measures such as exposure would not by themselves cause an entity to meet the major participant definitions. Some commenters suggested that the substantial position threshold should reflect an amount of "systemic risk."⁸⁹

⁸⁷ But see letter from Christopher A. Klem, Ropes & Gray, dated September 2, 2010 (test should account for frequency of trading and frequency of trading with non-dealers).

⁸⁸ See letter from Andrew Baker, Chief Executive Officer, Alternative Investment Management Association, dated September 24, 2010 ("AIMA letter") (discussing possible methods of estimating the maximum risk of loss related to positions); letter from Warren Davis, Of Counsel, Sutherland Asbill & Brennan LLP on behalf of the Federal Home Loan Banks, dated September 20, 2010 (in addressing "substantial counterparty exposure" test, noting the possibility of accounting for the potential exposure of a portfolio).

⁸⁹ See letter from Edward J. Rosen, Cleary Gottlieb Steen & Hamilton LLP, dated September 21, 2010 ("Cleary letter") (suggesting that the threshold should be akin to the amount that is required for a non-financial entity to be designated as systemically important under Title I of the Dodd-Frank Act).

Section 113 of the Dodd-Frank Act provides that the Financial Stability Oversight Council ("FSOC") may determine that a non-bank financial company shall be supervised by the Federal Reserve Board, subject to prudential standards, if the FSOC "determines that material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States." In making that determination, the FSOC is to consider: Leverage; off-balance sheet exposures; transactions and relationships with other significant non-bank financial companies and bank holding companies; importance as a source of credit and liquidity; extent to which assets are managed rather than owned; the nature, scope, size, scale, concentration, interconnectedness and mix of activities; presence of a primary financial regulator; assets and liabilities; and any other appropriate risk-related factors.

2. Proposed Substantial Position Thresholds

The Commissions recognize that it is important for the substantial position thresholds to be set using objective numerical criteria. Objective criteria should permit regulators, market participants and entities that may be subject to the regulations to readily evaluate whether swap or security-based swap positions meet the thresholds, and should promote the predictable application and enforcement of the requirements governing major participants.

In determining the substantial position thresholds—in light of what is "prudent for the effective monitoring, management, and oversight" of entities that are systemically important or can significantly impact the U.S. financial system—the Commissions are mindful that tests based on *current uncollateralized* exposure and tests based on *potential future* exposure both have respective advantages and disadvantages. We thus are proposing tests that would account for both types of exposure.

A test that focuses solely on the current uncollateralized exposure associated with an entity's swap and security-based swap positions should provide a reasonable measure of the theoretical amount of potential risk that an entity would pose to its counterparties if the entity currently were to default.⁹⁰ Such a test also should be relatively clear-cut for market entities to implement, and would be based on calculations that we expect that market entities would perform as a matter of course.

At the same time, a focus solely on current uncollateralized exposure could be overly narrow by failing to identify risky entities until some time after they begin to pose the level of risk that should subject them to regulation as major participants. Because exposure can change significantly over short periods of time, and a swap or security-based swap position that may pose large potential exposures nonetheless would often have a mark-to-market exposure of zero at inception, an entity's positions may already pose significant risk to counterparties and to the market even before its uncollateralized mark-to-market exposure increases up to the applicable threshold. A test that focuses solely on current uncollateralized

exposure thus would not appear to be sufficient to satisfy the systemic importance standard required by the statute.

Tests based on measures of potential future exposure—which would address an estimate of how much the value of a swap or security-based swap might change against an entity over the remaining life of the contract—could address the gap left by a current uncollateralized exposure test. Potential future exposure tests, however, would reflect only an estimate of that type of risk, and would only be as effective as the factors used by the test.

While we have considered several other types of tests that could be used to determine the substantial position threshold, we preliminarily do not believe that the advantages of those tests justify their disadvantages. For example, while a threshold based on the number of an entity's counterparties could help identify highly interconnected entities (a factor that some have argued is important for identifying an entity's systemic risk), it also has been argued that a large number of counterparties could mean that the losses associated with that entity's default would be divided and absorbed by many counterparties without broader market effects.⁹¹ While a threshold that is based on an entity's financial strength would help account for the possibility of an entity's default as well as the effects of such a default, it would not address swap-related risks to the market that are not directly linked to the entity's default. In other words, an entity that has large out-of-the-money swap or security-based swap positions and faces a margin call may cause significant price movements in the swaps or security-based swaps and in the related reference entities or assets if the entity chooses to unwind its positions, even if the entity itself does not appear to present a large threat of default. These movements may be exacerbated if other entities have similar positions.

Moreover, although substantial position thresholds based on the financial strength of an entity's counterparties would help measure the potential that an entity's default would have a broader impact, such thresholds could result in disparate results between two entities with identical positions,

⁹¹ See AIMA letter ("An entity that has only a small number of counterparties may only affect a small number of entities directly, should it fail, but the impact could be significant if the position is large and the counterparty is a systemically important entity. A diversified exposure to multiple entities could affect more entities but is likely to be smaller and thus shares the losses in the industry and having less systemic impact.").

⁹⁰ In practice, however, this measure may underestimate the amount of risk that an entity poses to its counterparties, given that it may take multiple days to liquidate a defaulting entity's swap or security-based swap positions, during which time prices may move against the defaulting entity.

and also could encourage concentration of exposure or potential future exposure within a few counterparties. While tests that are based on the volume of an entity's swaps or security-based swaps may be helpful in identifying significant swap or security-based swap activity, such tests would not directly be germane to the current or potential future exposure posed by an entity's swap and security-based swap positions. Finally, while we have considered the feasibility of tests that take specific contract features into account (e.g., triggers that require the payment of mark-to-market margin if an entity's credit rating is lowered), we preliminarily believe that simpler tests of exposure can more efficiently identify the risks associated with particular swap or security-based swap positions.

After considering these alternatives, the Commissions are proposing two tests to define "substantial position." One test would focus exclusively on an entity's current uncollateralized exposure; the other would supplement a current uncollateralized exposure measure with an additional measure that estimates potential future exposure. A position that satisfies either test would be a "substantial position."

The Commissions, however, request comment on whether it would be appropriate to use other types of approaches for determining whether an entity has a substantial position—as an alternative to, or in addition to, the two proposed tests.

a. Proposed Current Exposure Test

The proposed first substantial position test, which would focus solely on current uncollateralized exposure, in general would set the substantial position threshold by reference to the sum of the uncollateralized current exposure, obtained by marking-to-market using industry standard practices, arising from each of the person's positions with negative value in each of the applicable "major" category of swaps or security-based swaps (other than positions excluded from consideration, such as positions for the purpose of "hedging or mitigating commercial risk").⁹²

⁹² See proposed CEA rule 1.3(sss)(2); proposed Exchange Act rule 3a67–3(b)(1). In other words, the test would measure the portion of the exposure that is not offset by the posting of collateral. If a position was collateralized only partially, the value of the collateral posted would be offset against the total exposure, and the test would measure the residual part of the exposure. We recognize that there may be operational delays between changes in exposure and the resulting exchanges of collateral, and in general we would not expect that operational delays associated with the daily exchange of collateral would be considered to lead to uncollateralized exposure for these purposes.

A person would apply this proposed substantial position test on a major category-by-major category basis, examining its positions with each counterparty with which the person has swaps or security-based swaps in the particular category. For each counterparty, the person would determine the dollar value of the aggregate current exposure arising from each of its swap or security-based swap positions with negative value (subject to the netting provisions described below) in that major category by marking-to-market using industry standard practices, and deduct from that amount the aggregate value of the collateral the person has posted with respect to the swap or security-based swap positions. The aggregate uncollateralized outward exposure would be the sum of those uncollateralized amounts over all counterparties with which the person has entered into swaps or security-based swaps in the applicable major category.⁹³

The proposed test would not prescribe any particular methodology for measuring current exposure or the value of collateral posted,⁹⁴ and instead would provide that the method should be consistent with counterparty practices and industry practices generally.⁹⁵

As noted above, the statutory definitions require us to consider the presence of central clearing in setting the substantial position threshold. This test would account for the risk-mitigating effects of central clearing in that centrally cleared swaps and security-based swaps are subject to mark-to-market margining that would largely eliminate the uncollateralized exposure associated with a position, effectively resulting in cleared positions being excluded from the analysis.

⁹³ See proposed CEA rule 1.3(sss)(2); proposed Exchange Act rule 3a67–3(b)(2).

⁹⁴ Depending on the particular circumstances of the swap or security-based swap, such collateral may be posted to a third-party custodian, directly to the counterparty, or in accordance with the rules of a derivatives clearing organization or clearing agency.

⁹⁵ Consistent with industry practices, we would expect that entities may value exposure based on measures that take into account the amounts that would be payable if the transaction were terminated. Also, to the extent the valuation of collateral posted in connection with swaps or security-based swaps is subject to other rules or regulations, we would expect that the valuation of collateral for purposes of the major participant calculations would be consistent with those applicable rules.

At the same time, we recognize that there can be disputes or uncertainty as to an entity's exposure in connection with swap and security-based swap positions, and as to the valuation of the collateral it has posted in connection with those positions. In some circumstances this could lead to uncertainty as to whether the entity is a major participant. As addressed below, we are requesting comment as to the potential significance of these issues, and as to whether we should set forth additional guidance or mandate the use of specific standards with respect to these valuations.

This proposed test would account for the risk mitigating effects of netting agreements⁹⁶ by permitting an entity to calculate its exposure on a net basis, by applying the terms of master netting agreements entered into between the entity and a single counterparty.⁹⁷ When calculating the net exposure the entity may take into account offsetting positions with that particular counterparty involving swaps, security-based swaps and securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements) to the extent that is consistent with the offsets provided by the master netting agreement.⁹⁸

The Commissions preliminarily believe that this approach is appropriate because it avoids identifying a position's exposure as being "uncollateralized" when there is no current counterparty risk associated with it due to offsets under a netting agreement with the counterparty.⁹⁹ In

Also, it is important to recognize that while we expect that other regulatory requirements applicable to the valuation of swap or security-based swap positions and collateral would be relevant to certain calculations relating to major participant status, our proposed rules would not be relevant for other purposes, such as in the context of capital and margin requirements.

⁹⁶ Section 362(b)(17) of the United States Bankruptcy Code generally provides derivatives contracts with a safe harbor from the Bankruptcy Code's automatic stay, thus allowing parties to these contracts to enforce their contractual rights, including those associated with netting and offsets, even after a counterparty has filed for bankruptcy.

In addition, Section 210(c)(8)(A) of the Dodd-Frank Act reaffirms the enforceability of netting and offset provisions in certain derivatives contracts with insolvent counterparties that have been placed under the receivership of the Federal Deposit Insurance Corporation ("FDIC"). However, the Dodd-Frank Act also places certain limitations on the timing by which netting rights may be exercised when the FDIC has been appointed as the receiver of an insolvent counterparty. See Dodd-Frank Act section 210(c)(10)(B).

⁹⁷ To the extent that the two counterparties maintain multiple netting agreements (e.g., separate agreements for dollar-denominated and euro-denominated instruments), the calculation would account only for the netting permitted under the netting agreement that is relevant to the swap or security-based swap at issue.

⁹⁸ See proposed CEA rule 1.3(sss)(2)(iii)(A); proposed Exchange Act rule 3a67–3(b)(3)(A). As is the case for the proposed rules on valuation, the proposed rules regarding possible offsets of various positions are for purposes of determining major participant status only. Other rules proposed by the Commissions may address the extent to which, if any, persons such as dealers and major participants may offset positions for other purposes.

⁹⁹ If, for example, an entity was \$X out of the money in connection with a security-based swap, but was \$X in the money with the same counterparty in connection with a swap, there would be no economic need for the entities to exchange collateral in connection with those offsetting positions. A test that fails to account for

Continued

calculating current uncollateralized exposure, however, the entity may not take into account the market risk offsets associated with holding positions with multiple counterparties.¹⁰⁰ Also, the entity may not “double count” any offset or collateral—once any item of collateral or any position with positive value has been applied against current exposure, the same item cannot be applied for purposes of this test against any other exposure.

The proposal to permit this type of netting, however, raises questions as to how an entity’s net out-of-the-money exposure with a counterparty, and the collateral posted with respect to its positions with the counterparty, should be allocated among swap positions, security-based swap positions and other positions specified in the rule.¹⁰¹ In particular, when an entity has not fully collateralized its net current exposure to a particular counterparty with which it has a netting agreement, there may be questions regarding how to attribute the net out-of-the-money positions and associated collateral to its swap or security-based swap positions. We preliminarily believe that an entity that has net uncollateralized exposure to a counterparty should, for purposes of the test, allocate that net uncollateralized exposure *pro rata* in a manner that reflects the exposure associated with each of its out-of-the-money swap positions, security-based swap positions and non-swap positions.¹⁰² This allocation would be intended to cause the measure of uncollateralized exposure connected with swaps or security-based swaps for purposes of the test to reasonably reflect the relative contribution of those instruments to an

this netting of exposure could lead the entities to engage in needless offsetting exchanges of collateral.

¹⁰⁰ See proposed CEA rule 1.3(sss)(2)(iii)(C); proposed Exchange Act rule 3a67–3(b)(2)(iii). While recognizing that offsetting positions of that type would reduce the market risk facing the entity, the offsets would not be expected to directly mitigate the risks that the entity’s counterparties would face if the entity were to default.

¹⁰¹ This issue does not arise to the extent that an entity’s net positions with a counterparty are fully collateralized.

¹⁰² In other words, if an entity’s out-of-the-money rate swap positions have \$W exposure, its out-of-the-money other commodity swap positions have \$X exposure, its out-of-the-money security-based swap positions have \$Y exposure, and its other out-of-the-money positions covered by that netting agreement have \$Z exposure, fractions of the collateral equal to $W/(W+X+Y+Z)$ should be allocated to the rate swap positions, $X/(W+X+Y+Z)$ to the other commodity swap positions and $Y/(W+X+Y+Z)$ to the security-based swap positions. A similar process should be used for allocating net out-of-the-money exposure across the categories of swaps and security-based swaps that have out-of-the-money exposure when one or more categories are in-the-money.

entity’s total overall uncollateralized exposure.

For purposes of the definition of “major swap participant,” the Commissions are proposing to set the current uncollateralized exposure threshold at a daily average of \$1 billion in the applicable major category of swaps, except that the threshold for the rate swap category would be a daily average of \$3 billion. For purposes of the definition of “major security-based swap participant,” this threshold would be based on a daily average of \$1 billion in the applicable major category of security-based swaps.¹⁰³ We preliminarily believe that these proposed thresholds are appropriate for identifying entities that, through their swap and security-based swap activities, have a significant potential to pose the systemic importance or risks to the U.S. financial system that the major participant definition and associated statutory requirements were intended to address, but we also recognize that it is possible that the appropriate threshold should be higher or lower. In proposing these specific thresholds, we have sought to take into account several factors: (i) The ability of the financial system to absorb losses of a particular size;¹⁰⁴ (ii) the appropriateness of setting “prudent” thresholds that are materially below the level that could cause significant losses to the financial system as it would not be appropriate for the substantial position test to encompass entities only after they pose significant risks to the market through their swap or security-based swap activity;¹⁰⁵ and (iii) the need to account for the possibility that multiple market participants may fail close in time, rather than focusing narrowly on the potential impact of a single participant’s default.¹⁰⁶ Based on these factors, we

¹⁰³ See proposed CEA rule 1.3(sss)(1); proposed Exchange Act rule 3a67–3(a)(1).

¹⁰⁴ In this regard, the Commissions preliminarily believe that the “Tier 1” capital of major dealer banks provides relevant information about the ability of the financial system to absorb losses of a particular size. We note that, among U.S. banks that are dealers in credit derivatives, the six largest banks account for the vast majority of dealing activities. We understand that the most liquid “Tier 1” regulatory capital for those six banks ranges from \$14 billion to \$113 billion.

¹⁰⁵ In other words, the proposed thresholds are intended to be low enough to provide for the appropriately early regulation of an entity whose swap or security-based swap positions have a reasonable potential of posing significant counterparty risks and risks to the market that stress the financial system, while being high enough that it would not unduly burden entities that are materially less likely to pose these types of risks.

¹⁰⁶ For example, the proposed \$1 billion threshold for swaps and security-based swaps would reflect a potential loss of \$3 billion if three large swap or security-based swap entities were to

preliminarily believe that the proposed substantial position thresholds would reasonably be expected to apply to entities that have the potential of satisfying the statutory criteria of systemic importance or significant impact to the U.S. financial system. As discussed below, however, we welcome comments on the appropriateness of the proposed threshold.

These proposed thresholds would be evaluated by reference to a calculation of the mean of an entity’s uncollateralized exposure measured at the close of each business day, beginning on the first business day of each calendar quarter and continuing through the last business day of that quarter.¹⁰⁷ In this regard, the Commissions have taken into account commenters’ concerns that an entity’s exposure should not be evaluated based on a single point in time, as short-term market fluctuations may not fairly reflect the risks of the entity’s positions. The use of a daily average approach should help address commenters’ concerns about the impact of short-term price fluctuations, and also help preclude the possibility that an entity may seek to use short-term transactions to distort the measure of exposure.

The Commissions request comment on the proposed current uncollateralized exposure test. Commenters particularly are requested to address whether the proposed threshold amounts of current uncollateralized exposure are appropriate, and, if not, what alternative higher or lower threshold amounts would appropriately identify entities that pose the types of risks that the definition was intended to address. In this regard, commenters specifically are requested to address whether bank Tier 1 capital provides a good indicative reference of the ability of major dealers to absorb losses of a particular size, or whether alternative reference points for the analysis (e.g., the size of the swap market or security-based swap market) would also be applied. Commenters are requested to address whether uncollateralized mark-to-market exposure is the appropriate way to measure current exposure, and if not, what alternative approach is more appropriate, and why. Commenters also are requested to address whether the

fail close in time. That \$3 billion could represent a significant impairment of the ability of some major dealers to absorb losses, as reflected by their Tier 1 capital.

We also are mindful of the views expressed by the two commenters that suggested particular dollar values for the threshold. See note 85, *supra*.

¹⁰⁷ See proposed CEA rule 1.3(sss)(4); proposed Exchange Act rule 3a67–3(d).

proposed thresholds reasonably address the need to set the threshold at a prudent level so as to avoid the possibility that the substantial position test would encompass entities only after they pose significant risks to the market, whether the proposed thresholds reasonably address the possibility that multiple market entities could fail close in time, and whether the proposed thresholds reasonably address the fact that swap or security-based swap activities would comprise only part of the risks to the market posed by an entity. To what extent would this proposed definition of “substantial position” have an effect on the activities of entities that potentially may be deemed to be major participants? What impact could these types of effects have on liquidity, on risk-taking or risk-reducing activities, or on other aspects of the relevant markets?

Also, more fundamentally, we request comment on whether the substantial position analysis also should encompass a test that does not account for the collateral posted in connection with an entity's exposure, given that tests that account for the posting of collateral would not encompass entities that have very large swap or security-based swap positions that are fully collateralized (either by the posting of bilateral collateral or by virtue of central clearing). In that light, should the analysis seek to capture entities that have very large positions in light of potential market disruptions such entities could cause, regardless of whether the positions are collateralized?

Commenters further are requested to address whether such thresholds should also account for entities that have large in-the-money positions that may indicate their potential significance to the market. In this regard, commenters also are asked to address whether the thresholds should specifically address entities with large in-the-money positions that lead them to receive large amounts of collateral posted by their counterparties, particularly to the extent that such collateralized in-the-money positions could later turn and lead the entity to incur losses.

In addition, commenters are requested to address whether and how it would be appropriate to adjust the threshold amounts over time, including whether these proposed current uncollateralized exposure thresholds should periodically be adjusted by formula to reflect changes in the ability of the market to absorb losses over time, or changes in other criteria over time. Commenters further are requested to address whether the test will be practical for potential major participants to use. Moreover,

commenters are requested to address whether the proposed current exposure test should be modified to account for the risks associated with the expected time lag between an entity's default and the liquidation of its swap or security-based swap positions.

Commenters also are requested to address whether we should set forth additional guidance or mandate the use of specific standards with respect to the measure of exposure or valuing collateral posted, or should specify particular procedures in the event of valuation disputes. What particular industry standard documentation and other methodologies could be used to measure exposure and value collateral? Also, how could regulatory requirements applicable to the valuation of collateral be relevant to the valuation of collateral for purposes of the major participant definitions?

Commenters are invited to address whether the rule should provide that, in measuring their current uncollateralized exposure, entities must value collateral in a way that is at least as conservative as such collateral would be valued according to applicable haircuts or other adjustments dictated by applicable regulations. Commenters further are requested to address whether the test should exclude certain types of collateral that cannot readily be valued. Also, commenters are requested to address whether the proposed method of evaluation—the mean of an entity's uncollateralized exposure measures at the close of each business day, beginning on the first business day of each calendar quarter and continuing through the last business day of that quarter—would be unduly burdensome or potentially subject to gaming or evasion.

Should the proposed approach for measuring uncollateralized current exposure be amended or supplemented, such as by establishing requirements for how exposure should be measured or collateral should be valued in certain circumstances (e.g., requiring the valuation of certain types of collateral to be conservative during times of rapid price changes in the relevant asset class)? Should current exposure and collateral be required to be valued in accordance with US generally accepted accounting principles? Would measurement according to such principles differ in any respects from measurement under the proposal, and, if so, how?

In addition, commenters are requested to address the proposed netting provisions of this test, including: whether the proposed test would reasonably permit the measure of

uncollateralized exposure to account for bilateral netting agreements; whether additional types of positions should be included within the netting provisions; whether the proposal appropriately takes into account the netting of exposures and collateral involving positions in financial instruments other than swaps, security-based swaps and securities financing transactions and if so, whether any limitations to such offsetting would be necessary or appropriate; whether the netting provisions should accommodate offsetting positions involving the net equity balance in an entity's securities account (e.g., free credit balances, other credit balances, and fully paid securities), and if so, whether any limitations to such offsetting would be necessary or appropriate; whether the netting provisions should accommodate offsets for exposures, or collateral connected with the positions that an entity has with the affiliate of a counterparty; and whether the proposed method of allocating the uncollateralized portion of exposures among the different types of financial instruments that are all subject to a single netting agreement is appropriate.

Commenters also are requested to address whether the proposed current uncollateralized exposure test would pose significant monitoring burdens upon entities that have swap or security-based swap positions that are significant enough to potentially meet the current uncollateralized exposure threshold. Should we provide guidance as to policies and procedures that such an entity should be able to follow to demonstrate that it does not meet the applicable thresholds?

b. Proposed Current Exposure Plus Potential Future Exposure test

The second proposed test would account both for current uncollateralized exposure (as discussed above) and for the potential future exposure associated with swap or security-based swap positions in the applicable “major” category of swaps or security-based swaps. This additional test would allow the major participant analysis to take into account estimates of how the value of an entity's swap or security-based swap positions may move against the entity over time.

The potential future exposure portion of this proposed test would be based on an entity's “aggregate potential outward exposure,” which would reflect the potential exposure of the entity's swap or security-based swap positions in the applicable “major” category of swap or security-based swaps, subject to certain adjustments. Bank capital standards also

make use of this type of test,¹⁰⁸ and this proposal builds upon those standards but modifies them to focus on the risk that an entity poses to its counterparties (rather than on the risk that counterparties pose to an entity). In doing so, this proposal seeks to use a test that can be implemented by a range of market participants, and that can be expected to lead to reproducible results across market participants with identical swap or security-based swap portfolios, rather than relying on alternative tests (e.g., value at risk measures or stress testing methodologies) that may be costly for market participants to implement and that would not be expected to lead to reproducible results across participants.

The exposure measures in general would be based on the total notional principal amount of those positions, adjusted by certain risk factors that reflect the type of swap or security-based swap at issue and the duration of the position.¹⁰⁹ For positions in which

¹⁰⁸ See 12 CFR part 3, app. C, section 32 (Office of the Comptroller of the Currency bank capital standards).

¹⁰⁹ For example, consistent with the bank standards, the multiplier for equity swaps would range from 0.06 for equity swaps of one year or less to 0.10 for equity swaps with a maturity of more than five years. See proposed Exchange Act rule 3a67-3(c)(2)(i)(A). For security-based swaps based on the credit of a reference entity, the multiplier would be 0.1.

The current bank capital standards contain a distinction based on whether the credit derivative is on "investment grade" or "non-investment grade" reference entities, providing a 0.1 multiplier for the former and a lower 0.05 multiplier for the latter. We preliminarily do not believe that a test that distinguishes among reference entities by reference to their credit ratings would be appropriate for purposes of these definitions, particularly in light of the fact that the Dodd-Frank Act mandates the substitution of credit ratings with other standards of creditworthiness in U.S. regulations. See Dodd-Frank Act section 939A.

The multipliers in part will be a function of the remaining maturity of the swap or security-based swap. If the swap or security-based swap, however, is structured such that on specified dates the outstanding exposure is settled and the terms are reset so the market value is zero, the remaining maturity would equal the time until the next reset date.

Although we recognize that these risk multipliers may suggest a lower than expected volatility of credit or equity derivatives of that duration, this may be offset by the fact that the proposed calculations of potential future exposure do not directly account for portfolio netting or collateral updates that could mitigate future exposure. We preliminarily believe that the use of these thresholds (and proposed related calculations) for purposes of identifying major participants are consistent with similar bank capital standards and are therefore suitable for use as an estimate of potential future exposure. We are also cognizant that requiring a more complete calculation of potential future exposure may be costly and burdensome for participants, especially those who would otherwise not meet the thresholds for major swap or security-based swap participant and would not have systems in place to perform a more complete calculation.

the stated notional amount is leveraged or enhanced by the particular structure, this calculation would be based on the position's effective notional amount.¹¹⁰

At the same time, the proposed measures would contain adjustments for certain types of positions that pose relatively lower potential risks.¹¹¹ In addition, the general risk-adjusted notional measures of potential future exposure would be reduced to reflect the risk mitigation effects of master netting agreements, in a manner consistent with bank capital standards.¹¹²

The proposed measures of potential future exposure would contain further downward adjustments to account for

¹¹⁰ See proposed CEA rule 1.3(sss)(3)(ii); proposed Exchange Act rule 3a67-3(c)(2)(i)(B). For purposes of this rule, in the case of positions that represent the sale of an option on a swap or security-based swap (other than the sale of an option permitting the person exercising the option to purchase a credit default swap), we would view the effective notional amount of the option as being equal to the effective notional amount of the underlying swap or security-based swap, and we would view the duration used for purposes of the formula as being equal to the sum of the duration of the option and the duration of the underlying swap or security-based swap.

¹¹¹ The analysis would exclude swap or security-based swap positions that constitute the purchase of an option, such that the person has no additional payment obligations under the position, as well as other positions on which the person has prepaid or otherwise satisfied all of its payment obligations. See proposed Exchange Act rule 3a67-3(c)(2)(i)(C).

For similar reasons, the potential outward exposure associated with a position by which a person buys credit protection using a credit default swap would be capped at the net present value of the unpaid premiums. See proposed CEA rule 1.3(sss)(3)(ii)(A)(4); proposed Exchange Act rule 3a67-3(c)(2)(i)(D).

¹¹² In particular, for swaps or security-based swaps subject to master netting agreements the potential exposure associated with the person's swap or security-based swaps with each counterparty would equal a weighted average of the potential exposure in the applicable "major" category of swaps or security-based swaps with a particular counterparty as calculated without reference to netting, and that amount reduced by the ratio of net current replacement cost to gross current replacement cost of all swap and security-based swap positions with that counterparty, consistent with the following equation: $P_{Net} = 0.4 \times P_{Gross} + 0.6 \times NGR \times P_{Gross}$.

Under this formula, P_{Net} is the potential exposure in the applicable "major" category of swaps or security-based swaps adjusted for bilateral netting; P_{Gross} is the potential exposure in that category without adjustment for bilateral netting; and NGR is the ratio of net current replacement cost to gross current replacement cost. See proposed CEA rule 1.3(sss)(3)(ii)(B); proposed Exchange Act rule 3a67-3(c)(2)(ii).

The "NGR" ratio is intended to serve as a type of proxy for the impact of netting on potential future exposure, but does not serve as a precise indicator of future changes in net exposure relative to gross exposure, as the ratio and potential exposure can be influenced by many idiosyncratic properties of individual portfolios. See Basle Committee on Banking Supervision, "The Treatment of the Credit Risk Associated with Certain Off-Balance-Sheet Items" (July 1994).

the risk mitigation effects of central clearing and mark-to-market margining. In particular, if the swap or security-based swap positions are cleared by a registered clearing agency or subject to daily mark-to-market margining,¹¹³ the measures of potential future exposure would further be adjusted to equal twenty percent of the potential future exposure calculated using the methodology described above.¹¹⁴ The Commissions preliminarily believe that a significant downward adjustment would be appropriate because clearing and daily mark-to-market margining would be expected to reduce the potential future risks posed by an entity's swap or security-based swap positions. Also, it is appropriate to incentivize the use of central clearing and daily mark-to-market margining as practices for helping to control risks. We are not proposing to entirely eliminate such cleared and margined positions from the analysis of potential future exposure, however, because clearing may not entirely eliminate the risks posed by an entity's potential default,¹¹⁵ and daily mark-to-market margining would not eliminate the risks associated with large intra-day price movements. While the proposed amount of the adjustment seeks to balance these

¹¹³ For these purposes, a swap or security-based swap would be considered to be subject to daily mark-to-market margining if, and for as long as, the counterparties follow the daily practice of exchanging collateral to reflect changes in exposure (after taking into account any other positions addressed by a netting agreement between the parties). If a person is permitted to maintain an uncollateralized "threshold" amount under the agreement, that amount (regardless of actual exposure) would be considered current uncollateralized exposure for purposes of the test. Also, if the agreement provides for a minimum transfer amount in excess of \$1 million, the entirety of that amount would be considered current uncollateralized exposure. See proposed CEA rule 1.3(sss)(3)(iii)(B); proposed Exchange Act rule 3a67-3(c)(3)(ii).

In this way, the measure of potential future exposure would reflect for the risk mitigating benefits of daily margining, while specifically accounting for industry practices that limit those benefits. Of course, to take advantage of this adjustment it is not enough to the agreement to provide for daily mark-to-market margining—the parties must actually follow that practice.

¹¹⁴ See proposed CEA rule 1.3(sss)(3)(iii)(A); proposed Exchange Act rule 3a67-3(c)(3).

¹¹⁵ For example, the central counterparties that clear credit default swaps do not necessarily become the counterparties of their members' customers (although even absent direct privity those central counterparties benefit customers by providing for protection of collateral they post as margin, and by providing procedures for the portability of the customer's positions in the event of a dealer's default). As a result, central clearing may not eliminate the counterparty risk that the customer poses to the dealer. Even then, however, required mark-to-market margining should help control that risk, and central clearing thus would be expected to reduce the likelihood that an entity's default would lead to broader market impacts.

competing factors, we recognize that alternative higher or lower downward adjustments may also be appropriate.

For purposes of the “major swap participant” definition, the substantial position threshold would be \$2 billion in daily average current uncollateralized exposure plus aggregate potential outward exposure in the applicable major swap category, except that the threshold for the rate swap category would be a daily average of \$6 billion. For purposes of the “major security-based swap participant” definition, the substantial position threshold would be \$2 billion in daily average current uncollateralized exposure plus aggregate potential outward exposure in any major security-based swap category.¹¹⁶ These proposed amounts reflect the same factors discussed above in the context of the current uncollateralized exposure test,¹¹⁷ but are raised to reflect the fact that potential future exposure is a measure of potential risk over time, and hence is less likely to pose a direct, immediate impact on the markets than current measures of uncollateralized exposure. We recognize that alternative risk thresholds may also be appropriate, and we welcome comment on potential alternatives.

In light of the amount of this threshold and the underlying risk adjustments, we preliminarily do not believe that an entity would need to calculate its potential future exposure for purposes of the test unless the entity has large notional positions. For example, in light of the proposed risk adjustment of 0.10 for credit derivatives, an entity that does not have any uncollateralized current exposure would have to have notional positions of at least \$20 billion to potentially meet the \$2 billion threshold, even before accounting for the discounts associated with netting agreements. If those swaps or security-based swaps are cleared or subject to mark-to-market margining, the additional 20 percent risk adjustment would mean that the entity without current uncollateralized exposure would have to have cleared notional positions of at least \$100 billion to possibly meet that threshold.¹¹⁸

The Commissions request comment on this proposed use of a current exposure plus potential future exposure test to determine the substantial

position threshold. Commenters particularly are requested to address the appropriateness of using potential exposure risk adjustments derived from bank capital rules; and the appropriateness of using bank capital methodologies for addressing positions subject to netting agreements. Also, should this test be supplemented by a test that accounts for the notional amount of an entity’s swap or security-based swap positions without risk-adjustments, to focus on entities that have very large swap or security-based swap positions?

Commenters are requested to address whether the proposed threshold amounts for the proposed current exposure plus potential future exposure test are appropriate, and if not, what alternative threshold amounts would be more appropriate, and why. In addition, commenters are requested to address the proposed method of discounting the potential future exposure associated with cleared positions or positions subject to daily mark-to-market margining to equal 20 percent of what the measure of potential future exposure would be otherwise. Would a larger or smaller discount be appropriate? Is there data available that may assist with reaching the appropriate discount factor? Also, in that regard, should both sets of discounts be equal, or should cleared positions be subject to more of a discount than uncleared positions subject to daily mark-to-market margining? Commenters also are invited to address whether the proposed discounts for cleared positions or positions that are marked-to-market would make it unnecessary or duplicative for this test separately to account for netting agreements. Also, if an entity currently has posted excess collateral in connection with a position, should the amount of that current overcollateralization be deducted from its measure of potential future exposure?

Commenters also are requested to address whether the proposed test in connection with purchases of credit protection—which would cap the measure of exposure at the net present value of unpaid premiums—would raise problems in implementation, and whether we should propose any particular discount rate to be used in conducting the calculation (and, if so, what discount rate should be appropriate). Also, should the measure of potential future exposure in connection with purchases of credit protection and options also account for collateral that a counterparty has posted in connection with an entity’s in-the-money positions, given that such

collateralized in-the-money positions could later turn and cause losses to an entity? In addition, for positions that represent the sale of options on swaps or security-based swaps, would the effective notional amount of the option for purposes of the calculation properly be deemed to be the notional amount of the underlying instrument (or should the notional amount of the option vary based on the link between the changes in the value of the option and changes in the value of the underlying), and would the duration of the option properly be deemed to be the sum of the duration of the option and the duration of the underlying swap or security-based swap?

Commenters also are requested to address whether the risk adjustment for credit derivatives should reflect the riskiness of the underlying reference entity, and, if so, how should that be accomplished in a way that does not rely on the use of credit ratings.

The proposed test of potential future exposure is based in part on the application of fixed multipliers to the notional amounts, or effective notional amounts, of swaps and security-based swaps. In this regard, commenters are invited to discuss whether there are alternative tests that would be more effective to determine potential future exposure or otherwise to supplement an uncollateralized current exposure test, and whether such alternative tests may be more effectively developed in the near future, when additional data regarding swap and security-based swap positions are likely to be available. In particular, commenters are requested to identify any tests based on non-proprietary risk models that could be uniformly applied by all potential major participants to measure potential future exposure. Commenters who propose alternative tests are asked to address how the tests would provide consistent results across different types of swaps and security-based swaps, including customized instruments, in the different major categories. Commenters are also invited to address, on the other hand, whether a single test based on uncollateralized current exposure (*i.e.*, without any test of potential future exposure) would be adequate for identifying entities whose swap or security-based swap positions pose a relatively high degree of risk to counterparties and to the markets. In addition, commenters are invited to identify any tests or thresholds below which a party would be deemed not to be a major swap participant, without needing to calculate the exposure tests set forth in the proposed rule.

¹¹⁶ See proposed Exchange Act rule 3a67–3(a)(2).

¹¹⁷ See notes 103 to 106, *supra*, and accompanying text.

¹¹⁸ Based on these thresholds, we preliminarily believe that only relatively few entities would regularly have to perform these potential future exposure calculations with regard to their security-based swaps. See notes 181 and 182, *infra*, and accompanying text.

Commenters further are requested to address whether and how it would be appropriate to adjust the threshold amounts over time, including whether these proposed thresholds should periodically be adjusted by formula to reflect changes in the ability of the market to absorb losses over time, or changes in other criteria over time. In addition, commenters are requested to address whether the proposed use of a daily average measure for purposes of this test would be burdensome for potential major participants to implement, and, if so, how often should potential participants have to measure these amounts. Commenters also are requested to address whether any such tests should seek to reflect the maximum level of exposure associated with a position, rather than risk-adjusted estimates of exposure proposed here.

In addition, commenters are requested to address whether this proposed test would pose significant monitoring burdens upon entities that have swap or security-based swap positions that are significant enough to potentially meet the combined current uncollateralized exposure and potential future exposure test. Should we provide guidance as to policies and procedures that such an entity should be able to follow to be able to demonstrate that it does not meet the applicable thresholds?

C. "Hedging or Mitigating Commercial Risk"

The first test of the major participant definitions excludes positions held for "hedging or mitigating commercial risk" from the substantial position analysis.¹¹⁹

Commenters took the position that this exclusion from the major participant definitions should encompass a variety of uses of swaps and security-based swaps to hedge risks faced by non-financial entities.¹²⁰ Some commenters also suggested that the exclusion should be interpreted to address risks such as "balance sheet risk," the "risk of under-diversification," and hedges undertaken on a portfolio basis. Some commenters favored interpreting this exclusion to permit its use by insurers and banks. One commenter emphasized the need to avoid taking interpretations that would encourage commercial entities not to

manage risks that they otherwise would manage.¹²¹ Commenters also took the position that the addition of the word "mitigating" was intended to expand the exclusion beyond what would have been encompassed had only the term "hedging" been used.¹²²

1. Proposed Interpretation

In interpreting the meaning of "hedging or mitigating commercial risk" for purposes of the first test of the major participant definitions, the Commissions first note that virtually identical language is found in the Dodd-Frank provisions granting an exception from the mandatory clearing requirement to non-financial entities that are using swaps or security-based swaps to hedge or mitigate commercial risk.¹²³ Because Congress used virtually identical language in both instances, the Commissions intend to interpret the phrase "hedging or mitigating commercial risk" with respect to the participant definitions in the same manner as the phrase "hedge or mitigate commercial risk" in the exception from the mandatory clearing requirement.¹²⁴ The Commissions also note that although only non-financial entities that

¹²¹ See Cleary letter (also urging inclusion of "all risks" arising in connection with a company's business activities, including risks incidental to a company's ordinary course of business).

¹²² See MetLife letter (addition of mitigation "plainly indicates that this exclusion intends an expansive definition of hedging and can also encompass non-speculative derivatives positions used to manage economic risk, including potentially diversification and synthetic asset strategies, such as the conservative 'replication' strategy permitted under State insurance laws"); letter from Joanne R. Medero, Managing Director, BlackRock, dated September 20, 2010 (addressing the parallel context of the exclusion for ERISA plan positions).

¹²³ See CEA section 2(h)(7)(A); Exchange Act section 3C(g)(1)(B) (exception from mandatory clearing requirements when one or more counterparties are not "financial entities" and are using swaps or security-based swaps "to hedge or mitigate commercial risk"). The definition of commercial risk here is for purposes of only the major participant definitions and, to the extent the interpretation is similar, for purposes of the end-user exception from the mandatory clearing requirement. The concept of commercial risk may be interpreted differently for other purposes under the CEA and the Exchange Act.

¹²⁴ There is a technical difference in the way those provisions use the concept of hedging and mitigating commercial risk—in that the major participant definitions specifically refer to "positions held for hedging and mitigating commercial risk" while the end-user exception refers to a counterparty that "is using [swaps or security-based swaps] to hedge or mitigate commercial risk." That difference is consistent with the different language used in the two places (particularly the use of "substantial position" in the major participant definitions) and we do not see a reason why the use of the term in the context of the major participant definitions should be construed differently than its use in the comparable clearing exception.

are using swaps or security-based swaps to hedge or mitigate commercial risk generally may qualify for the clearing exemption, no such statutory restriction applies with respect to the exclusion for hedging positions in the first major participant test. Accordingly, with respect to the first major participant test, it appears that positions established to hedge or mitigate commercial risk may qualify for the exclusion, regardless of the nature of the entity—*i.e.*, whether a financial entity (including a bank) or a non-financial entity.¹²⁵

In general, we are premising the proposed exclusion on the principle that swaps or security-based swaps necessary to the conduct or management of a person's commercial activities should not be included in the calculation of a person's substantial position.¹²⁶ In this regard, the Commissions preliminarily believe that whether an activity is commercial should not be determined solely by the person's organizational status as a for-profit company, a non-profit organization or a governmental entity. Rather, the determinative factor should be whether the underlying activity to which the swap relates is commercial in nature.¹²⁷

¹²⁵ The presence of the third major participant test suggests that financial entities generally may not be precluded from taking advantage of the hedging exclusion in the first test. The third test, which does not account for hedging, specifically applies to non-bank financial entities that are highly leveraged and have a substantial position in a major category of swaps or security-based swaps. That test would be redundant if the hedging exclusion in the first major participant test were entirely unavailable to financial entities.

Also, had the statute intended the phrase "hedge or mitigate commercial risk" to apply only to activities of or positions held by non-financial entities, it would not have been necessary to include an additional provision in the statute generally restricting the availability of the clearing exception to non-financial entities.

¹²⁶ The scope of the proposed exclusion is based on our understanding that when a swap or security-based swap is used to hedge an entity's commercial activities, the gains or losses associated with the swap or security-based swap itself will be offset by losses or gains in the entity's commercial activities, and hence the risks posed by the swap or security-based swap to counterparties or the industry generally will be mitigated.

¹²⁷ We do not concur with the suggestion that the use of the word "mitigating" within the major participant definitions was intended to mean something significantly more than hedging. Other provisions of the Dodd-Frank Act appear to use the terms "hedging" and "mitigating" interchangeably; for example, certain provisions of the Dodd-Frank Act refer to "risk-mitigating hedging activities." See Dodd-Frank Act section 619 (adding Section 13 to the Bank Holding Company Act of 1956); Dodd-Frank Act section 619 (adding Section 27B to the Securities Act of 1933). Title VII also refers to "[h]edging and other similar risk mitigating activities." Dodd-Frank Act section 716(d)(1).

¹¹⁹ See CEA section 1a(33)(A)(i)(I); Exchange Act section 3(a)(67)(A)(i)(I).

¹²⁰ See, e.g., letter from Coalition for Derivatives End-Users, dated September 20, 2010 (discussing, *inter alia*, a supplier's use of credit derivatives in connection with a cash receivable, and a company's use of equity derivatives in connection with a stock repurchase program).

a. Proposed Exclusion in the “Major Swap Participant” Definition

As a general matter, the CFTC preliminarily believes that whether a position hedges or mitigates commercial risk should be determined by the facts and circumstances at the time the swap is entered into, and should take into account the person’s overall hedging and risk mitigation strategies. At the same time, the swap position could not be held for a purpose that is in the nature of speculation, investing or trading. Although the line between speculation, investing or trading, on the one hand, and hedging, on the other, can at times be difficult to discern, the statute nonetheless requires such determinations.¹²⁸ The CFTC expects that a person’s overall hedging and risk management strategies will help inform whether or not a particular position is properly considered to hedge or mitigate commercial risk. Although the definition includes swaps that are recognized as hedges for accounting purposes or as bona fide hedging for purposes of an exemption from position limits under the CEA, the swaps included within the proposed exclusion are not limited to those categories. Rather, the proposal covers swaps hedging or mitigating any of a person’s business risks, regardless of their status under accounting guidelines or the bona fide hedging exemption.

The CFTC invites comment on whether swaps qualifying for the hedging or risk mitigation exclusion should be limited to swaps where the underlying hedged item is a non-financial commodity. Commenters may also address whether swaps subject to this exception should hedge or mitigate commercial risk on a single risk or an aggregate risk basis, and on a single entity or a consolidated basis. The CFTC also invites comment on whether risks such as the foreign exchange, currency, or interest rate risk relating to offshore

affiliates, should be covered; whether industry-specific rules on hedging, or rules that apply only to certain categories of commodity or asset classes are appropriate at this time; whether swaps facilitating asset optimization or dynamic hedging should be included; and whether hedge effectiveness should be addressed. Commenters are requested to discuss both the policy and legal bases underlying their comments.

b. Proposed Exclusion in the “Major Security-Based Swap Participant” Definition

The proposed meaning of “hedging or mitigating commercial risk” for purposes of the “major security-based swap participant” definition would require that a security-based swap position be economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, where they arise from the potential change in the value of assets, liabilities and services connected with the ordinary course of business of the enterprise.¹²⁹ This standard is intended to exclude from the first major participant test security-based swaps that pose limited risk to the market and to counterparties because the positions would be substantially related to offsetting risks from an entity’s commercial operations.¹³⁰ The security-based swaps included within the proposed rule would not be limited to those recognized as hedges for accounting purposes; rather, the proposal has been drafted to cover security-based swaps used in the broader range of transactions commonly referred to as economic hedges,

regardless of their status under accounting guidelines.

At the same time, the security-based swap position could not be held for a purpose that is in the nature of speculation or trading.¹³¹ In addition, the security-based swap position could not be held to hedge or mitigate the risk of another security-based swap position or swap position unless that other position itself is held for the purpose of hedging or mitigating commercial risk as defined by the rule or CEA rule 1.3(tt).¹³²

We look forward to commenters’ views on whether the proposed standard strikes an appropriate balance in determining which positions may be excluded for purposes of the first major participant test. We recognize that there are other reasonable views as to what positions may appropriately be considered to be for the purposes of hedging or mitigating commercial risk. We also recognize the importance of providing as clear guidance as possible as to what is or is not a hedging position for these purposes.

The proposal also would condition the entity’s ability to exclude these security-based swap positions on the entity engaging in certain specified activities related to documenting the underlying risks and assessing the effectiveness of the hedge in connection with the positions.¹³³ These activities are intended to help ensure that positions excluded for purposes of the

¹³¹ See proposed Exchange Act rule 3a67–4(b)(1). For these purposes, we preliminarily believe that security-based swap positions that are held for the purpose of speculation or trading are those positions that are held intentionally for short-term resale and/or with the intent of benefiting from actual or expected short-term price movements or to lock in arbitrage profits, as well as security-based swap positions that hedge other positions that themselves are held for the purpose of speculation or trading. Thus, for example, positions that would be part of a “trading book” of an entity such as a bank would not constitute hedging positions that may be excluded for purposes of the first major participant test.

¹³² See proposed Exchange Act rule 3a67–4(b)(2).

¹³³ See proposed Exchange Act rule 3a67–4(a)(3). The proposal particularly would require the person to: Identify and document the risks that are being reduced by the security-based swap position; establish and document a method of assessing the effectiveness of the security-based swap as a hedge; and regularly assess the effectiveness of the security-based swap as a hedge.

We expect that market participants that have security-based swap activities significant enough that they may be major participants would already engage in risk assessment activities for their hedging positions, either formally or informally, and thus we do not believe that the proposed requirements would disrupt existing business practices. Instead, the proposal is intended to create standards that will allow market participants to confirm their compliance with the rule by formalizing risk assessment activities that should already be part of an effective hedging program.

¹²⁸ We preliminarily believe that swap positions that are held for the purpose of speculation or trading are, for example, those positions that are held primarily to take an outright view on the direction of the market, including positions held for short term resale, or to obtain arbitrage profits. Swap positions that hedge other positions that themselves are held for the purpose of speculation or trading are also speculative or trading positions.

We preliminarily believe that swap positions that are held for the purpose of investing are, for example, those positions that are held primarily to obtain an appreciation in value of the swap position itself, without regard to using the swap to hedge an underlying risk. In contrast, a swap position related to a non-swap investment (such as the purchase of an asset that a commercial enterprise will use to produce income or otherwise advance its commercial interests) may be a hedging position if it otherwise qualifies for the definition of hedging or mitigating commercial risk.

¹²⁹ See proposed Exchange Act rule 3a67–4(a). The concept of “economically appropriate” already is found in rules under the CEA pertaining to the definition of “bona fide hedging” for purposes of an exemption from position limits. See CEA rule 1.3(z). In the context of the definition of “major security-based swap participant,” we may take into account existing interpretations of that term under the CEA, but only to the extent that such interpretations would appropriately be applied to the use of security-based swaps for hedging.

The SEC preliminarily plans to interpret the concept of “economically appropriate” based on whether a reasonably prudent person would consider the security-based swap to be appropriate for managing the identified commercial risk. The SEC also preliminarily believes that for a security-based swap to be deemed “economically appropriate” in this context, it should not introduce any new material quantum of risks (*i.e.*, it cannot reflect over-hedging that could reasonably have a speculative effect) and it should not introduce any basis risk or other new types of risk (other than the counterparty risk that is attendant to all security-based swaps) more than reasonably necessary to manage the identified risk.

¹³⁰ These hedging positions would include activities, such as the management of receivables, that arise out of the ordinary course of an entity’s commercial operations, including activities that are incidental to those operations.

first major participant test would not extend to positions that are not entered into to reduce or hedge commercial risks, or that at a later time no longer substantially serve to reduce or mitigate such risks.¹³⁴

We preliminarily believe that this proposed approach would facilitate the following types of security-based swap positions:

- Positions established to manage the risk posed by a customer's, supplier's or counterparty's potential default in connection with: financing provided to a customer in connection with the sale of real property or a good, product or service; a customer's lease of real property or a good, product or service; a customer's agreement to purchase real property or a good, product or service in the future; or a supplier's commitment to provide or sell a good, product or service in the future;¹³⁵

- Positions established to manage the risk posed by a financial counterparty (different from the counterparty to the hedging position at issue) in connection with a separate transaction (including a position involving a credit derivative, equity swap, other security-based swap, interest rate swap, commodity swap, foreign exchange swap or other swap, option, or future that itself is for the purpose of hedging or mitigating commercial risk pursuant to the rule or CEA rule 1.3(ttt));

- Positions established to manage equity or market risk associated with certain employee compensation plans, including the risk associated with market price variations in connection with stock-based compensation plans, such as deferred compensation plans and stock appreciation rights;

- Positions established to manage equity market price risks connected with certain business combinations, such as a corporate merger or consolidation or similar plan or acquisition in which securities of a person are exchanged for securities of any other person (unless the sole purpose of the transaction is to change an issuer's domicile solely within the United States), or a transfer of assets of a person to another person in consideration of the issuance of

securities of such other person or any of its affiliates;

- Positions established by a bank to manage counterparty risks in connection with loans the bank has made; and
- Positions to close out or reduce any of those positions.

2. Request for Comments

We request comment on the proposed definition of "hedging or mitigating commercial risk" for purposes of both the "major swap participant" and the "major security-based swap participant" definitions. Commenters particularly are requested to address whether the proposed definitions would adequately limit the types of swaps or security-based swaps that are encompassed by the definition, such that the definitions do not encompass positions that serve speculative, trading or other non-hedging purposes. In this regard, do the proposed definitions appropriately exclude from the scope of the definition swaps and security-based swaps that would be less likely to pose risks to counterparties and the market, by virtue of gains or losses on those swaps being offset by losses or gains associated with an entity's commercial operations? Commenters further are requested to address whether the proposed "economically appropriate" standard would effectively limit the positions encompassed by the definition. If not, what alternative standards (e.g., standards derived from accounting principles) would more effectively identify hedging positions and distinguish those from positions held for other purposes? In that regard, is the concept of "economically appropriate" well-understood, and, if not, is there another concept that would more effectively delimit the nature of the relationship between the swap or security-based swap position and the risk being hedged or mitigated? Also, in the context of the definition of this term for purposes of security-based swaps, should existing interpretive guidance pertaining to the concept of "economically appropriate" with respect to the CEA's bona fide hedging exemption for position limits be considered, and, if so, to what extent? We further request comment on possible alternative approaches to the test identifying positions entered into for the purpose of hedging or mitigating commercial risk. For example, should the test require the entity excluding a position to have a reasonable basis to believe, and to actually believe, that the excluded swap would be a "highly effective," "reasonably effective" or "economically appropriate" hedge of a

specified commercial risk? Should the test be generally identical to the proposed test, but with the substitution of the phrase "highly effective" or "reasonably effective" (or another standard) for "economically appropriate"? Should the test be based on accounting principles for hedging treatment (i.e., a quantitative test requiring the hedge to be within a certain band of effectiveness)?

Commenters also are requested to address the proposed restrictions on positions in the nature of speculation or trading. Is it appropriate not to permit any speculative or trading positions from being deemed for the purpose of hedging or mitigating commercial risk? What would be the impact of such an interpretation on an entity's risk mitigation practices? Also, is the dividing line between speculative and trading positions on the one hand, and positions eligible to be considered to be hedging positions on the other hand, sufficiently clear? Is such a line appropriately based on whether the position is intended to be held for the short-term versus long-term intent? Would some alternative criteria be preferable in terms of setting forth objective standards for identifying risk reducing hedging positions and distinguishing them from other positions? Also, would additional standards or other guidance be appropriate to help ensure that positions used in connection with speculative or trading purposes do not fall within the definition?

We further request comment on the proposal that a swap or security-based swap would not fall within the definition of "hedging or mitigating commercial risk" if it is held to hedge or mitigate the risk of another swap or security-based swap, unless that other position itself is held for the purpose of hedging or mitigating commercial risk. One consequence of this approach might be that a particular swap or security-based swap hedging a particular type of risk would be included or excluded based solely on whether that risk arises from another swap or security-based swap or from a different type of transaction.¹³⁶ Is this the appropriate approach? What would be the consequences of this approach for

¹³⁴ This condition does not mandate that an entity follow a particular set of procedures to take advantage of the exclusion. We would expect that an entity that already engages in these types of risk assessment procedures in connection with its existing business activities to be able to rely on those procedures to satisfy the condition. These conditions also could be satisfied by the entity's use of a third-party to assist with these risk assessment activities.

¹³⁵ The references here to customers and counterparties do not include swap or security-based swap counterparties.

¹³⁶ For example, under this proposal an entity may exclude from the first major participant test a security-based swap used to manage the credit risk posed by a customer's default in connection with financing that an entity provides to that customer. The entity may not exclude an identical security-based swap, however, if that security-based swap is used to hedge the credit risk associated with a second swap or security-based swap that itself is not for the purpose of hedging or mitigating commercial risk.

different types of entities? How would the proposed approach affect the risk management practices of entities that are close to the proposed threshold? Is it appropriate to include both positions within the major participant calculations? If this general approach in the proposed rule were adopted, should there be any exceptions to the approach? What alternative approaches might be considered? For example, would it be appropriate to exclude a swap or security-based swap that hedges another swap or security-based swap from the calculation? What would be the advantages and disadvantages of this approach?

Moreover, commenters are requested to address whether the definition should encompass a quantitative test that would limit the total value of swaps and security-based swaps that an entity may include under this rule to be no more than the total value of underlying risk identified by such entity. If so, what measurement should be used for determining an entity's total value of swaps and security-based swaps and total value of underlying risk, and what methods or procedures should entities be required to follow when calculating and comparing the two values?

In addition, commenters are requested to address whether the proposed procedural requirements, in the context of this definition for purposes of the "major security-based swap participant" analysis, are appropriate. In this regard, commenters are requested to discuss whether there are any advantages or disadvantages to providing more specific procedural requirements; whether the proposed procedural requirements will alter business practices to the extent that a transition period is necessary before they are implemented; and whether specific guidance is required to address how the proposed procedural requirements will affect existing positions. In addition, commenters are requested to address whether the proposed procedural requirements should include a requirement to quantify the underlying risk and the effectiveness of the hedge, and whether such quantitative assessments would impose significant systems costs or other costs. Also, should an assessment of hedging effectiveness be required at all, in light of the costs that may be associated with such a requirement?

More generally, would the proposed standards for identifying positions for the purpose of hedging or mitigating commercial risk suffice to allow a person holding a security-based swap position to identify and document the commercial risks that are being hedged

or mitigated by that position, and if not, what additional requirements are needed? Should additional guidance be provided regarding whether components of risks (in assets, liabilities or services) or whether risks in portfolios (of assets, liabilities or services) may be identified as the commercial risks that are being hedged or mitigated by the position, and, if so, which components? Also, should additional guidance be provided with respect to the form of documentation or the elements of the hedging relationship that should be documented, and, if so, which elements? Moreover, if a swap or security-based swap that was hedging at inception were no longer to serve a hedging purpose over time, should it no longer fall within the definition of hedging or mitigating commercial risk?

In addition, should the rule specify the frequency with which an entity should assess the effectiveness of the hedge? Also, should we provide additional guidance on the acceptable methods of assessing effectiveness? Is a qualitative assessment adequate to assess effectiveness or should a quantitative assessment also be required? Should the rule establish a level of offset between the position and the hedged risk, below which the position would not be considered to be effective at reducing risk, and, if so, what is the level of offset (or range of levels) below which the position should not be considered to be effective? Are there methods for assessing effectiveness that should not be permitted for these purposes?

Commenters also are requested to address whether the proposal also should encompass certain activities in which an entity hedges an affiliate's risks.

We further request comment on how the definition should apply to hedging activities by financial entities. Commenters particularly are invited to address whether financial entities should be able to rely on this exclusion, or whether financial entities should face special limits in the context of this exclusion. Commenters further are requested to address how the proposed provisions excluding positions in the nature of speculation or trading from the definition would apply to activities by banks, including permissible trading activities by banks, and, in particular, whether it is appropriate to exclude positions that are part of an entity's "trading book."

Commenters also are requested to address the application of the proposal to registered investment companies, including whether additional guidance would be appropriate with respect to

which uses of security-based swaps by registered investment companies would fall within the exclusion.

D. "Substantial Counterparty Exposure"

The second test of the major participant definitions addresses entities whose swaps and security-based swaps "create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets."¹³⁷ Unlike the first test of the major participant definitions, this test does not focus on positions in a "major" category of swaps or security-based swaps. Also, unlike the first test, this test does not explicitly exclude hedging positions or certain ERISA plan positions from the analysis.

Some commenters suggested that the second major participant definition test should be interpreted in a manner similar to the first test. Many commenters stated that the analysis should also reflect netting agreements and the posting of collateral. Some commenters stated that the test should exclude hedging positions, and cleared positions.

We preliminarily believe that the second major participant definition test's focus on the counterparty risk associated with an entity's swap or security-based swap positions is similar enough to the "substantial position" risks embedded in the first test that the second test appropriately takes into account the same measures of current uncollateralized exposure and potential future exposure that are used in our proposal for the first test. For the second test, however, the thresholds must focus on the entirety of an entity's swap positions or security-based swap positions, rather than on positions in any specific "major" category. In addition, this second test does not explicitly account for positions for hedging commercial risk or ERISA positions.

Accordingly, these proposed calculations of substantial counterparty exposure would be performed in largely the same way as the calculation of substantial position in the first major participant definition tests, except that the amounts would be calculated by reference to all of the person's swap or security-based swap positions, rather than by reference to a specific "major" category of such positions.¹³⁸

For purposes of the "major swap participant" definition, the CFTC

¹³⁷ See CEA section 1a(33)(A)(ii); Exchange Act section 3(a)(67)(A)(ii)(II).

¹³⁸ See proposed CEA rule 1.3(uuu)(2); proposed Exchange Act rule 3a67-5(b)(1).

proposes that the second major participant definition test be satisfied by a current uncollateralized exposure of \$5 billion, or a combined current uncollateralized exposure and potential future exposure of \$8 billion, across the entirety of an entity's swap positions.¹³⁹ For purposes of the "major security-based swap participant" definition, the SEC proposes that the second test be satisfied by a current uncollateralized exposure of \$2 billion, or a combined current uncollateralized exposure and potential future exposure of \$4 billion, across the entirety of an entity's security-based swap positions.¹⁴⁰ We look forward to commenters' views as to whether alternative thresholds would be more appropriate to achieve the statutory goals.

These proposed thresholds in part are based on the same factors that underpin the proposed "substantial position" thresholds.¹⁴¹ The proposed thresholds, however, also reflect the fact that this test must account for an entity's positions across four major swap categories or two major security-based swap categories.¹⁴² These proposed thresholds, moreover, have further been raised to reflect the fact that this second test (unlike the first major participant test) encompasses certain hedging positions that, in general, we would expect to pose fewer risks to counterparties and to the markets as a whole than positions that are not for purposes of hedging.

We request comment on this proposal. Commenters particularly are requested to address whether the proposed use of current uncollateralized exposure and potential future exposure tests (including the parts of those tests that account for positions that are cleared or subject to mark-to-market margining) are appropriate, and whether the proposed thresholds are set at an appropriate level. Should the thresholds be higher or lower? If so, what alternative threshold amounts would be more appropriate, and why? Commenters also are requested to address whether the test should exclude commercial risk and ERISA hedging positions, on the grounds that those hedging positions may not raise the same degree of risk to counterparties as other swap or security-based swap positions. Comments are also requested on whether the test of

substantial counterparty exposure, given its focus on the systemic risks arising from the entirety of a person's portfolio, should include a measure to take into account the person's combined swap positions and security-based swap positions.

E. "Financial Entity" and "Highly Leveraged"

The third test of the major participant definitions addresses any "financial entity," other than one subject to capital requirements established by an appropriate Federal banking agency,¹⁴³ that is "highly leveraged relative to the amount of capital" the entity holds, and that maintains a substantial position in a "major" category of swaps or security-based swaps. This test does not permit an exclusion for positions held for hedging.

As discussed below, we are proposing specific definitions of the terms "financial entity" and "highly leveraged." In addition, we request comment on whether we should include additional regulators within the proposed interpretation of what is an appropriate Federal banking agency.

1. Meaning of "financial entity"

While the third major participant definition test does not explicitly define "financial entity," Title VII of the Dodd-Frank Act defines "financial entity" in the context of the end-user exception from mandatory clearing (an exception that generally is not available to those entities).¹⁴⁴ Some commenters have pointed out that using that definition here would produce circular results.¹⁴⁵

We preliminarily do not believe there is a basis to define "financial entity" for purposes of the major participant definitions in a way that materially differs from the definition used in the end-user exception from mandatory clearing. Using the same basic definition also would appear to be consistent with the statute's intent to treat non-financial end-users differently than financial entities. Accordingly, other than

technical changes to avoid circularity, we propose to use the same definition in the major participant definitions.¹⁴⁶

Commenters are requested to address our proposed definition of "financial entity."

2. Meaning of "Highly Leveraged"

Some commenters have stated that the term "highly leveraged" should be interpreted by looking at the leverage associated with other firms in an entity's line of business, rather than by applying an across-the-board measure of leverage.¹⁴⁷ One commenter suggested that higher leverage may be warranted for entities with a smaller capital base, and another commenter suggested that we look at analogous banking regulations rather than creating a new regime for measuring leverage. Some commenters suggested ways of addressing specific items for purposes of determining leverage.¹⁴⁸

The Commissions recognize that traditional balance sheet measures of leverage have limitations as tools for

¹⁴⁶ See proposed CEA rule 1.3(vv)(1); proposed Exchange Act rule 3a67-6(a). To avoid circularity, the meaning of "financial entity" for purposes of the "major swap participant" definition would not encompass any "swap dealer" or "major swap participant" (but would encompass "security-based swap dealers" and "major security-based swap participants"). The meaning of "financial entity" for purposes of the "major security-based swap participant" definition would not encompass any "security-based swap dealer" or "major security-based swap participant" (but would encompass "swap dealers" and "major swap participants"). For both definitions, "financial entity" would include any: commodity pool (as defined in section 1a(10) of the CEA); private fund (as defined in section 202(a) of the Investment Advisers Act of 1940); employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974; and person predominantly engaged in activities that are in the business of banking or financial in nature (as defined in section 4(k) of the Bank Holding Company Act of 1956).

¹⁴⁷ See letter from Robert Pickel, Executive Vice Chairman, International Swaps and Derivatives Association, Inc., dated September 20, 2010 (suggesting that "leverage ratio limits to which banks and other regulated entities are subject would be unsuitably low for other enterprises"); letter from Steve Martinie, Assistant General Counsel and Assistant Secretary, The Northwestern Mutual Life Insurance Company, dated September 20, 2010 ("Northwestern Mutual letter") (suggesting that financial firms require less cushion than other entities because financial firms are able to match their assets and liabilities more closely).

¹⁴⁸ See Northwestern Mutual letter (suggesting that the Commissions recognize that liabilities such as bank deposits and insurance policy reserves are not leverage); Vanguard letter (suggesting that leverage should relate to debt financing and should not encompass potential leveraging effects posed by derivatives); SIFMA AMG letter (suggesting that the Commissions take into account the difference between non-recourse and recourse obligations, the difference between notional amounts payable and actual payable obligations, and the difference between actual financial obligations and leverage embedded in a derivative that affects returns but does not result in a payment obligation).

¹³⁹ See proposed CEA rule 1.3(uuu)(1).

¹⁴⁰ See proposed Exchange Act rule 3a67-5(a).

¹⁴¹ See notes 103 to 106 and 117, *supra*, and accompanying text.

¹⁴² Thus, these proposed thresholds in part would account for an entity that has large positions in more than one major category of swaps or security-based swaps, but that does not meet the substantial position threshold for either.

¹⁴³ Sections 721 and 761 of the Dodd-Frank Act add a definition of the term "appropriate Federal banking agency" in sections 1a and 3(a) of the CEA and the Exchange Act, respectively, 7 U.S.C. 1a(2), 15 U.S.C. 78c(a)(72). The Commissions propose to refer to those statutory definitions for purposes of the rules.

¹⁴⁴ See CEA section 2(h)(7)(C)(i); Exchange Act section 3C(g)(3)(A).

¹⁴⁵ See Cleary letter (also addressing status of broker-dealers and futures commission merchants as part of the analysis).

The circularity would result because, for purposes of the end-user clearing exception, "financial entity" is defined to include swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants.

evaluating an entity's ability to meet its obligations. In part this is because such measures of leverage do not directly account for the potential risks posed by specific instruments on the balance sheet, or financial instruments that are held off of an entity's balance sheet (as may be the case with an entity's swap and security-based swap positions). At the same time, we preliminarily do not believe that it is necessary to use more complex measures of risk-adjusted leverage here, particularly given that the third test in the major participant definitions already addresses those types of risks by considering whether an entity has a substantial position in a major category of swaps or security-based swaps. We are also mindful of the costs that entities would face if forced to undertake a complex risk-adjusted leverage calculation, especially for entities that would not already be performing this type of analysis.¹⁴⁹ Additionally, we preliminarily do not believe that it is necessary for the leverage standard to account for the degree of leverage associated with different types of financial entities.

Although the third test of the major participant definitions does not define "highly leveraged," we note that Congress addressed the issue of leverage in Title I of the Dodd-Frank Act. There, Congress provided that the Board of Governors of the Federal Reserve System must require a bank holding company with total consolidated assets equal to or greater than \$50 billion, or a nonbank financial company supervised by the Board of Governors, to maintain a debt to equity ratio of no more than 15 to 1 if the FSOC determines "that such company poses a grave threat to the financial stability of the United States and that the imposition of such requirement is necessary to mitigate the risk that such

company poses to the financial stability of the United States."¹⁵⁰

This requirement in Title I suggests potential alternative approaches to the definition of "highly leveraged" for purposes of the major participant definitions. On the one hand, the 15 to 1 limit may represent an upper limit of acceptable leverage, indicating that the limit for the major participant definitions should be lower so as to create a buffer between entities at that upper limit and entities that are not highly leveraged. On the other hand, the Title I requirement, which applies only when the entity in question poses a "grave threat" to financial stability, may indicate that the 15 to 1 leverage ratio is also the appropriate test of whether an entity poses the systemic risk concerns implicated by the major participant definitions.

For these reasons, we propose two possible definitions of the point at which an entity would be "highly leveraged"—either an entity would be "highly leveraged" if the ratio of its total liabilities to equity is in excess of 8 to 1, or an entity would be "highly leveraged" if the ratio of its total liabilities to equity is in excess of 15 to 1. In either case, the determination would be measured at the close of business on the last business day of the applicable fiscal quarter. To promote consistent application of this leverage test, entities that file quarterly reports on Form 10-Q and annual reports on Form 10-K with the SEC would determine their total liabilities and equity based on the financial statements included with such filings.¹⁵¹ All other entities would calculate the value of total liabilities and equity consistent with the proper application of U.S. generally accepted accounting principles.

We believe that the 15 to 1 ratio could be consistent with the use of that ratio in Title I, which, as noted above, provides that the 15 to 1 leverage ratio would be applied to a bank holding company or nonbank financial company subject to Title I as a maximum only if it is determined that the company poses a "grave threat" to financial stability. Commenters are requested to address whether the proposed 15 to 1 standard used in Title I suggests that a standard higher than 15 to 1 should be used here, given that the Title I standard is applicable only to large entities that also pose a "grave threat" to financial

stability and thus may suggest that a higher standard is appropriate for entities that do not pose the same degree of threat. Alternatively, the 8 to 1 ratio could be consistent with the exemption in the third test of the major participant definitions for financial institutions that are subject to capital requirements set by the Federal banking agencies, as it is possible that financial institutions were specifically excluded from the third test based on the presumption that they generally are highly leveraged, and hence would have been covered by the third test if they were not expressly exempted. Based on our analysis of financial statements it appears that those institutions generally have leverage ratios of approximately 10 to 1, which may suggest that the "highly leveraged" threshold would have to be lower for those institutions to be potentially subject to the third test. Such an approach would help to ensure that the third test of the major participant definition applies to financial entities that are not subject to capital requirements set by the Federal banking agencies, but that have leverage ratios similar to institutions that are subject to those requirements.

The Commissions request comment on the proposed alternative definitions of "highly leveraged." Commenters particularly are requested to specifically address the relative merits of the proposed alternative 8 to 1 and 15 to 1 standards, as well as other standards that they believe would be appropriate for these purposes.¹⁵²

Commenters further are requested to address whether a risk-adjusted leverage ratio should be used, and, if so, how the ratio should be calculated (including whether particular items should be included or excluded when making this calculation), and whether a risk-adjusted leverage ratio could be developed relying on measures already

¹⁴⁹ The Basel Committee on Banking Supervision recently proposed one method for calculating risk-adjusted leverage in its Consultative Document entitled: "Strengthening the resilience of the banking sector" (Dec. 2009). This proposal would create a new leverage ratio based on a comparison of capital to total exposure. Total exposure for these purposes would be measured by, among other things, including the notional value of all written credit protection, severely limiting the recognition given to netting, and calculating the risks associated with off-balance sheet derivatives transactions, as measured by the current exposure method for calculating future risks outlined in Basel II. The Consultative Document drew over 150 comments from the international financial community, which included both those in support of, and those that questioned the inclusion of a risk-adjusted leverage ratio within the Basel framework. The Basel Committee on Banking Supervision expects to deliver a full package of reforms by the end of 2010, based on the Consultative Document released in December 2009 and comments received thereon.

¹⁵⁰ See Dodd-Frank Act section 165(j)(1).

¹⁵¹ These entities would include those that submit periodic reports on a voluntary basis to the SEC, as well as those that are required to file periodic reports with the SEC.

¹⁵² In this regard, we recognize that under Exchange Act rule 15c3-1, a broker-dealer may determine its required minimum net capital, among other ways, by applying a financial ratio that provides that its aggregate indebtedness shall not exceed 1500% of its net capital (*i.e.*, a 15 to 1 aggregate indebtedness to net capital ratio). Exchange Act Rule 17a-11 further requires that broker-dealers that use such method to establish their required minimum net capital must provide notice to regulators if their aggregate indebtedness exceeds 1200% of their net capital (*i.e.*, a 12 to 1 aggregate indebtedness to net capital ratio). We recognize that these measures, however, reflect a different ratio of total liabilities to equity; for example, the calculation of aggregate indebtedness in rule 15c3-1 excludes certain liabilities, and the calculation of net capital includes certain subordinated debt—meaning that these measures would respectively be equivalent to ratios higher than 15:1 or 12:1 when converted to a balance sheet ratio of liabilities to equity such as that used under the proposed rule.

calculated by entities as a matter of course.¹⁵³ Commenters further are requested to address whether the leverage ratio should be revised to require that the amount of potential future exposure (as outlined in the “substantial position” discussion above) be combined with total liabilities before such number is compared to equity for purposes of calculating the ratio, and, if so, whether the proposed ratios would still be appropriate; whether the rule should more specifically address issues as to how certain types of positions or liabilities should be accounted for when calculating leverage; whether the proposed timing of the measurement—the close of business on the last business day of the applicable fiscal quarter—would be potentially subject to gaming or evasion; and whether the rule text should particularly prescribe how separate categories of entities calculate leverage.

F. Implementation Standard, Reevaluation Period and Minimum Duration of Status

While the analysis of whether an entity is a major participant is backward looking, an entity that meets the criteria for being a major participant is required to register with the CFTC and/or the SEC, and comply with the requirements applicable to major participants. We recognize that these entities will need time to complete their applications for registration and to come into compliance with the applicable requirements. We thus propose that an unregistered entity that meets the major participant criteria as a result of its swap or security-based swap activities in a fiscal quarter would not be deemed to be a major participant until the earlier of the date on which it submits a complete application for registration pursuant to CEA Section 4s(b) or Exchange Act Section 15F(b), or two months after the end of that quarter.¹⁵⁴ We preliminarily believe that this would provide entities with an appropriate amount of time to apply for registration and, with the time between the submission of an application and the effectiveness of the registration, to comply with the requirements applicable to major participants, without permitting undue delay.

¹⁵³ For example, would adjustments akin to those discussed above in the context of broker-dealer net capital provide a more useful measure of leverage for these purposes?

¹⁵⁴ See proposed CEA rule 1.3(qqq)(4)(i); proposed Exchange Act rule 3a67–7(a). The Commissions are proposing separate rules regarding the registration requirements and processes for major participants.

We also propose to provide a reevaluation for entities that meet one or more of the applicable major participant thresholds, but only by a modest amount.¹⁵⁵ In particular, an unregistered entity that has met these criteria as a result of its swap or security-based swap activities in a fiscal quarter, but without exceeding any applicable threshold by more than twenty percent, would not immediately be subject to the timing requirements discussed above. Instead, that entity would become subject to those requirements if the entity exceeded any of the applicable daily average thresholds in the next fiscal quarter.¹⁵⁶ We preliminarily believe this type of reevaluation period would avoid applying the major participant requirements to entities that meet the major participant criteria for only a short time due to unusual activity.

In addition, we propose that any entity that is deemed to be a major participant would retain that status until such time that it does not exceed any of the applicable thresholds for four consecutive quarters after the entity becomes registered.¹⁵⁷ Commentators raised concerns about the possibility of entities moving in and out of the status on a rapid basis,¹⁵⁸ and we believe that this proposal appropriately addresses that concern in a way that would help promote the predictable application and enforcement of the requirements governing major participants.

The Commissions request comment on these proposals. Commenters particularly are requested to address: Whether two months is an adequate amount of time for entities that have met the criteria to submit an application for registration; whether there is an adequate amount of time to make the necessary internal changes to come into compliance with the requirements applicable to major participants before being subject to those requirements as a result of a registration becoming effective; whether twenty percent is the appropriate threshold for applicability

¹⁵⁵ Commenters raised concerns over an entity qualifying as a major participant due to an unusual event. See, e.g., letter from American Benefits Council and Committee on the Investment of Employee Benefit Assets, dated September 20, 2010 (stating that quirky volatility may affect the determinations).

¹⁵⁶ See proposed CEA rule 1.3(qqq)(4)(ii); proposed Exchange Act rules 3a67–7(b).

¹⁵⁷ See proposed CEA rule 1.3(qqq)(5); proposed Exchange Act rules 3a67–7(c)(1).

¹⁵⁸ See Vanguard letter (suggesting that entities should remain in the status after qualification for an extended defined period such as one calendar year); AIMA letter (noting that recategorization of entities could be disruptive for entities' business models and could be administratively burdensome for the Commissions).

of the reevaluation period; whether there would be any risks arising from delaying registration as a major participant for an entity that exceeds the thresholds, but qualifies for the reevaluation period; and whether four consecutive quarters of not meeting the criteria for major participant status after registration is granted is the appropriate amount of time that a major participant should be required to stay in the status.

In addition, we request comment on the appropriateness of the proposed reevaluation period. Commenters particularly are requested to address whether it is likely that unusual market conditions could cause an entity to exceed the proposed thresholds over the course of a quarter (based on a daily average) without generally raising the types of risks that the thresholds were intended to identify. Also, should the use of the reevaluation period be conditioned on requiring any entity relying on the reevaluation period to make a representation, or otherwise demonstrate, that it exceeded the threshold due to a one-time extraordinary event, and that it will be below the threshold at the next time of measurement?

G. Limited Purpose Designations

In general, a person that meets the definition of major participant will be considered to be a major participant with respect to all categories of swaps or security-based swaps, as applicable, and with regard to all activities involving those instruments.¹⁵⁹ As discussed above, however, the statutory definitions provide that a person may be designated as a major participant for one or more categories of swaps or security-based swaps without being classified as a major participant for all categories.¹⁶⁰ Thus, as with the definitions of “swap dealer” and “security-based swap dealer,” we propose to provide that major participants who engage in significant activity with respect to only certain types, classes or categories of swaps or security-based swaps may apply for relief with respect to other types of swaps or security-based swaps from certain of the requirements that are applicable to major participants. The Commissions anticipate that a major participant could seek a limited designation at the same time as, or at a later time subsequent to, the person's initial registration as a major participant. Because of the variety of situations in which major participants

¹⁵⁹ See proposed CEA rule 1.3(qqq)(2); proposed Exchange Act rule 3a67–1(c).

¹⁶⁰ CEA section 1a(33)(C); Exchange Act section 3(a)(67)(C).

may enter into swaps or security-based swaps, it is difficult to set out at this time the conditions, if any, which would allow a person to be designated as a major participant with respect to only certain types, classes or categories of swaps or security-based swaps.

The Commissions request comment on the proposed rules regarding limited designation as a major participant. Commenters particularly are requested to address the circumstances in which such limited purpose designations would be appropriate, and to address the factors that the Commissions should consider when addressing such requests, and the type of information requestors should provide in support of their request. Commenters also are asked to address whether such limited purpose designations should be conditioned in any way, such as by the provision of information of the type that would be required with respect to an entity's swaps or security-based swaps involving the particular category or activity for which they are not designated as a major participant.

H. Additional Interpretive Issues

Commenters have raised additional issues related to the major participant definitions.

1. Exclusion for ERISA Plan Positions

As discussed above, the first test of the major participant definitions excludes from the analysis "positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of ERISA (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan." Some commenters suggested that the exclusion should encompass activities such as portfolio rebalancing and diversification, and gaining exposure to alternative asset classes, and that this type of exclusion also should apply to certain other types of entities.¹⁶¹

We preliminarily do not believe that it is necessary to propose a rule to further define the scope of this exclusion. In this regard, we note that this ERISA plan exclusion, unlike the other exclusion in the first major participant test, is not limited to "commercial" risk, which may be construed to mean that hedging by

ERISA plans should be broadly excluded.

While the Commissions are not proposing to make this type of exclusion available to additional types of entities, we request comment on whether we should do so. If so, what type of entities should receive this type of exclusion, and why do the concerns that led to the enactment of the major participant requirements in the Dodd-Frank Act not apply to such entities?

2. Application of Major Participant Definitions to Managed Accounts

Some commenters have stated that asset managers and investment advisers should not be deemed to be major participants by virtue of the swap and security-based swap positions held by the accounts they manage. These commenters have emphasized that asset managers and investment advisers are separate legal entities from the accounts that they administer, the accounts themselves are the counterparties to the swaps and security-based swaps, and managers and advisers do not maintain capital to support the trades of their clients. One commenter also expressed the view that the positions of individual accounts under the advisement of a single asset manager should not be aggregated for the purpose of the major participant definitions because different accounts managed by an asset manager may use the same positions for different purposes.¹⁶²

Preliminarily, we do not believe that the major participant definitions should be construed to aggregate the accounts managed by asset managers or investment advisers to determine if the asset manager or investment adviser itself is a major participant. The major participant definitions apply to the entities that actually "maintain" substantial positions in swaps and security-based swaps or that have swaps or security-based swaps that create substantial counterparty exposure. The Commissions have the authority to adopt anti-evasion rules to address the possibility that persons who enter into swaps and security-based swaps may attempt to allocate the swaps and security-based swaps among different accounts (thereby attempting to treat

such other accounts as the entity that has entered into the swaps or security-based swaps) for the purpose of evading the regulations applicable to major participants.¹⁶³ In addition, we note that since the major participant definitions focus on the entity that enters into swaps or security-based swaps, all of the managed positions of which a person is the beneficial owner are to be aggregated (along with such beneficial owner's other positions) for purposes of determining whether such beneficial owner is a major participant.¹⁶⁴

The Commissions request comment on the application of the major participant definitions to managed accounts. Commenters particularly are requested to address: whether additional guidance is necessary to address issues relating to the application of the major participant definition to managed accounts; whether there are areas of potential abuse, and if so, what they may be. Commenters further are requested to address whether the Commissions should adopt anti-evasion rules to address areas of potential abuse, and if so, how such rules should be crafted.

In addition, commenters are requested to discuss any implementation concerns that may arise if the beneficial owner of a managed account meets one of the major participant definitions; for example, would the beneficial owner face any impediments in terms of identifying whether it falls within the major participant definitions? Also, what implementation issues would arise with respect to applying the major participant definitions to managed accounts and/or their beneficial owners if the accounts' advisers or managers are not subject to regulation as major participants?

3. Application of Major Participant Definitions to Positions of Affiliated Entities

The issues discussed above with regard to managed accounts also are related to the separate issue of whether the major participant tests should, in some circumstances, aggregate the swap and security-based swap positions of entities that are affiliated. Absent that type of aggregation, an entity could seek to evade major participant status by allocating swap or security-based swap

¹⁶¹ See Cleary letter (addressing welfare plans or entities holding assets of such plans, such as voluntary employee beneficiary associations, employer group trusts or bank-maintained collective trusts); see also letter from Jane Hamblen, State of Wisconsin Investment Board, dated September 20, 2010.

¹⁶² In addition, a colloquy on the Senate floor addressed the status of managed accounts for purposes of the major participant definitions, particularly focusing on whether the analysis should "look at the aggregate positions of funds managed by asset managers or at the individual fund level?" In response, it was stated that, "[a]s a general rule, the CFTC and the SEC should look at each entity on an individual basis when determining its status as a major swap participant." See 156 Cong. Rec. S5907 (daily ed. July 15, 2010) (colloquy between Senators Hagan and Lincoln).

¹⁶³ See Dodd-Frank Act sections 721(b)(2), 761(b)(3).

¹⁶⁴ This guidance relates only to the application of the major participant definitions to managed accounts. It is not intended to apply to the treatment of managed accounts with respect to any other rules promulgated by the CFTC or SEC to implement Title VII of the Dodd-Frank Act or to any other applicable rules or requirements.

positions among a number of affiliated entities.

In situations in which a parent is the majority owner of a subsidiary entity, we preliminarily believe that the major participant tests may appropriately aggregate the subsidiary's swaps or security-based swaps at the parent for purposes of the substantial position analyses.¹⁶⁵ Attributing those positions to a parent appears consistent with the concepts of "substantial position" and "substantial counterparty exposure," given that the parent would effectively be the beneficiary of the transaction. In those circumstances, however, there still may be questions as to whether the requirements applicable to major participants—*e.g.*, capital, margin and business conduct—should be placed upon the parent or the subsidiary. We recognize that it may be appropriate at times to apply such requirements upon the subsidiary to the extent that the subsidiary is acting on behalf of the parent.¹⁶⁶

Commenters particularly are invited to discuss when it would be appropriate to apply the major participant definitions to entities that are the majority owner of subsidiaries that enter into swaps or security-based swaps, or whether attribution of a subsidiary's security-based swap positions is generally inappropriate. Also, to the extent this type of attribution is appropriate, to what extent should the subsidiary retain responsibilities for complying with the capital, margin, business conduct and other requirements applicable to major participants?

Commenters further are requested to address whether the swaps or security-based swaps of corporate subsidiaries in some circumstances should be attributed to an entity that itself is not the majority owner of the direct counterparty to a swap or security-based swap. Moreover, should this type of attribution apply when one entity controls another entity, and, if so, how should the concept of control be defined for these purposes? In addition, commenters are requested to address whether, as an alternative approach, this type of attribution would be appropriate specifically when a parent provides guarantees on behalf of its subsidiaries,

or third parties provide guarantees on behalf of unaffiliated entities.

Commenters further are requested to address any issues that would arise with regard to the effective implementation of the requirements applicable to major participants in the context of this type of attributions.

4. Application of Major Participant Definitions to Inter-Affiliate Swaps and Security-Based Swaps

Several commenters have suggested that swaps and security-based swaps between affiliated counterparties should not be considered within the analysis of whether an entity's swap or security-based swap positions cause it to be a major participant. Such inter-affiliate swaps and security-based swaps may be used to achieve various operational and internal efficiency objectives.

The Commissions preliminarily believe that when a person analyzes its swap or security-based swap positions under the major participant definitions, it would be appropriate for the person to consider the economic reality of any swaps or security-based swaps it enters into with wholly owned affiliates, including whether the swaps and security-based swaps simply represent an allocation of risk within a corporate group.¹⁶⁷ Such swaps and security-based swaps among wholly-owned affiliates may not pose the exceptional risks to the U.S. financial system that are the basis for the major participant definitions. As discussed above in the context of managed accounts, however, an entity would not be able to evade the requirements applicable to major participants by allocating among multiple affiliates swap or security-based swap positions of which it is the beneficial owner.

The Commissions request comment on the treatment of inter-affiliate swaps and security-based swaps between wholly-owned affiliates of the same corporate parent in connection with the major participant definitions.

Commenters also are requested to address whether similar interpretations should apply to swaps and security-based swaps between entities within a consolidated group as determined in accordance with U.S. generally accepted accounting principles. Commenters further are requested to discuss whether the major participant definition should be interpreted to encompass an entity

(including an affiliate of the named counterparty to the swap or security-based swap) that provides a guarantee of the named counterparty's obligations, either in the form of a guarantee or through some other form of credit support whereby the guarantor agrees to satisfy margin obligations of the named counterparty and/or periodic payment obligations of the named counterparty.

5. Legacy Portfolios

Some commenters have stated that certain entities that maintain legacy portfolios of credit default swaps that previously had been entered into in connection with the activities of monoline insurers and "credit derivative product companies" should not be considered major participants. The commenters argued that these entities would be unable to comply with the capital and margin requirements applicable to major participants, and that regulation as major participants is unnecessary given that the entities are not writing any additional swaps or security-based swaps.

We request comment on whether the rules further defining major swap participant and major security-based swap participant should exclude such entities from the major participant definition if their swap and security-based swap positions are limited to those types of legacy positions. The exclusion from the definition could be conditional, and any such excluded entity would be required to provide the Commissions with position information of the type that registered major participants would be required to provide. We invite comment on any other conditions that might be appropriate to an exclusion of such legacy portfolios from the major participant definitions.

6. Potential Exclusions

Some commenters stated that the major participant definitions should not be interpreted to apply to entities such as investment companies,¹⁶⁸ ERISA plans, registered broker-dealers and/or registered futures commission

¹⁶⁵ Arguably, the basis for this type of attribution would be even stronger if the parent wholly owns the subsidiary. An attribution rule that only addresses 100 percent ownership situations, however, may readily be susceptible to gaming if the parent were to sell a very small interest in the subsidiary to another party.

¹⁶⁶ It may also be appropriate to address these issues in connection with the rule proposals addressing the substantive requirements applicable to major participants.

¹⁶⁷ Such swaps and security-based swaps should be considered in this way only for purposes of determining whether a particular person is a major participant. The swaps and security-based swaps would continue to be subject to all laws and requirements applicable to such swaps and security-based swaps.

¹⁶⁸ See letter from Karrie McMillan, General Counsel, Investment Company Institute, dated September 20, 2010 (registered investment companies should be excluded from the major participant (and dealer) definitions, or else the terms of the definitions should be interpreted to clarify that mutual funds generally will not be major participants).

merchants,¹⁶⁹ and long-term investors such as sovereign wealth funds.¹⁷⁰

These comments, and the rationale behind the comments, raise the issue of whether we should exclude, conditionally or unconditionally, certain types of entities from the major participant definitions, on the grounds that such entities do not present the risks that underpin the major participant definitions and/or to avoid duplication of existing regulation. While we are not proposing any such exclusions, we request comment as to whether we should exclude certain types of entities, including those noted above, as well as to entities subject to bank capital rules, State-regulated insurers, private and State pension plans, and registered derivatives clearing organizations or clearing agencies.

Commenters particularly are requested to address whether such exclusions are necessary and appropriate in light of the proposed rules that would be applicable to major participants, whether any conditions would be appropriate for such exclusions, and whether modifying those proposed rules would more effectively address these issues than granting specific exclusions from the major participant definitions for specific types of entities. Commenters also are particularly requested to discuss whether banks should be excluded from the major participant definitions because of the regulation to which they already are subject. Commenters also are requested to discuss whether registered investment companies should be excluded from the major participant definitions because of the regulations to which they already are subject, and whether registered investment companies would be able to comply with capital and margin requirements applicable to major participants.

Commenters also particularly are requested to address whether sovereign wealth funds or other entities linked to foreign governments should be excluded

from the major participant definitions, particularly in light of the provisions of the Dodd-Frank Act governing its territorial reach, and whether the answer in part should be determined based on whether the entity's obligations are backed by the full faith and credit of the foreign government.

V. Administrative Law Matters—CEA Revisions (Definitions of “Swap Dealer” and “Major Swap Participant,” and Amendments to Definition of “Eligible Contract Participant”)

A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.¹⁷¹ The rules proposed by the CFTC provide definitions that will largely be used in future rulemakings and which, by themselves, impose no significant new regulatory requirements. Accordingly, the Chairman, on behalf of the CFTC, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The proposed rule will not impose any new recordkeeping or information collection requirements, or other collections of information that require approval of the Office of Management and Budget under the Paperwork Reduction Act.¹⁷² The CFTC invites public comment on the accuracy of its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the rules proposed herein.

C. Cost-Benefit Analysis

Section 15(a) of the CEA¹⁷³ requires the CFTC to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, Section 15(a) does not require the CFTC to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it requires that the CFTC “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and

the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The CFTC may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

1. Summary of Proposed Requirements

The proposed regulations would further define the terms “swap dealer,” “eligible contract participant,” “major swap participant,” and related terms, including “substantial position” and “substantial counterparty exposure.” The proposed regulations regarding eligible contract participants are clarifying changes that are not expected to have substantive effects on market participants. The proposed regulations further defining swap dealer and major swap participant are significant because any entity determined to be a swap dealer or major swap participant would be subject to registration, margin, capital, and business conduct requirements set forth in the Dodd-Frank Act, as those requirements are implemented in rules proposed or to be proposed by the CFTC. Those requirements will likely lead to compliance costs, capital holding costs, and margin posting costs, which have been or will be addressed in the CFTC's proposals to implement those requirements. On the other hand, those requirements will likely lead to benefits in the form of increased market transparency, reduced counterparty risk and a lower incidence of systemic crises and other market failures. This discussion concerns the costs and benefits arising from the proposed definitional tests themselves, in terms of the burden on market participants to determine how the proposed definitions apply, and the benefits arising from the specificity of the proposals.

2. Proposed Regulations Regarding “Eligible Contract Participant”

The proposal regarding “eligible contract participant” would provide that swap dealers and major swap participants would qualify as eligible contract participants. The CFTC believes this proposal is in line with the expectations of market participants and would impose virtually no costs while providing the benefit of greater certainty. The proposal would also

¹⁶⁹ See letter from The Swaps & Derivatives Marketing Ass'n, dated September 20, 2010 (certain hedged positions of broker-dealers and futures commission merchants with customers should not be considered as part of the substantial position analysis); Cleary letter (registered and well-capitalized broker-dealers and futures commission merchants should not fall within the scope of the third major participant test).

¹⁷⁰ See letter from Lee Ming Chua, General Counsel, Government of Singapore Investment Corp., dated September 20, 2010 (stating that the major participant definitions were not intended to apply to long-term financial investors); see also letter from Richard M. Whiting, The Financial Services Roundtable, dated September 20, 2010 (major participant definitions should exclude firms that solely act as investors).

¹⁷¹ 5 U.S.C. 601 *et seq.*

¹⁷² 44 U.S.C. 3501 *et seq.*

¹⁷³ 7 U.S.C. 19(a).

provide that certain commodity pools could not qualify as eligible contract participants under certain provisions specified in the proposal. The CFTC believes that this proposal clarifies the interpretation of this aspect of the eligible contract participant definition and would prevent the commodity pools from using a provision of the definition that was not intended to apply to the commodity pools. Thus, while the proposal would potentially impose some costs on the commodity pools that could no longer rely on certain provisions of the definition, benefits would arise from preventing the misinterpretation of the definition.

3. Proposed Regulations Regarding "Swap Dealer"

The proposal regarding "swap dealer" would further define the term by providing that any person that engages in specified activities is a swap dealer. The proposal describes these activities qualitatively and in relatively general terms that apply in the same way to all parts of the swap markets. With regard to the *de minimis* exemption from the definition, the proposal sets out bright-line quantitative tests to determine if a person's swap dealing activity is *de minimis*. For the exclusion of swaps in connection with originating a loan by an insured depository institution, the proposal describes the scope of the exclusion qualitatively in terms that depend primarily on the terms of the swaps that would be eligible for the exclusion and the identity of the parties to the swap. Also, the proposal includes a voluntary process by which a swap dealer may request that the CFTC limit the swap dealer designation to certain aspects of the person's activity.

a. Costs

The costs to a market participant from the proposed regulations further defining "swap dealer" would arise primarily from its need to review its activities and determine, as a qualitative matter, whether its activities are of the type described in the proposal. As its activities change from time to time, it would be necessary to repeat this review, and ongoing compliance costs may arise if the market participant determines that it should adapt its activities so as to not be encompassed by the definition. Because the proposed regulations are qualitative and on relatively general terms, there may be multiple interpretations of the general criteria by market participants. A market participant whose activities fall within the realm of those described in the proposal may have to incur the costs of a more focused review to determine

whether or not it is encompassed by the definition.

The proposal regarding the *de minimis* exemption, on the other hand, would impose lower costs because of the precise, quantitative nature of the proposed exemption. A market participant would incur only the cost of determining the applicable quantities, such as notional value, number of swaps, number of counterparties, and so forth set out in the proposal. The CFTC believes that relatively few market participants would have to determine whether the *de minimis* exemption applies to their activities, and there would be only a low number of instances where application of the quantitative tests would be uncertain. Similarly, the CFTC believes that insured depository institutions would incur relatively low costs to apply the proposed exclusion of swaps in connection with originating loans because the proposed criteria relate to matters in which the institution is directly involved.

Last, the costs of the voluntary process for a request for a limited designation as a swap dealer are difficult to predict because they would depend on the complexity of the person making the request and the particular factors that are relevant to the limited designation. The CFTC believes that the person making the request would have broad discretion in determining how to do so and thereby could control the costs of the request to some extent.

b. Benefits

The benefits of the proposed regulations further defining "swap dealer" include that they set out a single set of criteria to be applied by all market participants. Thus, the proposed regulations create a level playing field that permits all market participants to determine, on an equal basis, which activities would potentially lead to designation as a swap dealer. The proposed regulations are set out in plain language terms that may be understood and applied by all market participants without relying on the technical expertise that may be required to implement more elaborate tests. The CFTC believes that the proposal can be fairly applied by substantially all market participants who could potentially be swap dealers.

Regarding the proposals regarding the *de minimis* exemption and the exclusion of swaps in connection with the origination of loans, benefits arise from the relatively specific, quantitative nature of the proposals. Since these proposals are expected to be applied by relatively few market participants in

limited situations, more detailed regulations are appropriate. The CFTC believes that these detailed criteria will permit market participants to make a relatively quick and low-cost determination of whether the exemption or exclusion apply. The proposal for requests for a limited swap dealer designation provides the benefit of flexibility to allow each market participant making this request to determine how to do so.

4. Proposed Regulations Regarding "Major Swap Participant"

The proposal regarding "major swap participant" would further define the term by setting out quantitative thresholds against which a market participant would compare its swap activities to determine whether it is encompassed by the definition. The proposal would require that potential major swap participants analyze their swaps in detail to determine, for example, which of their swaps are subject to netting agreements or mark-to-market collateralization and the amount of collateral posted with respect to the swaps. The proposal includes a general, qualitative definition of the swaps that may be excluded from the comparison because they are used to "hedge or mitigate commercial risk." Like the swap dealer proposal, there is a voluntary process by which a major swap participant may request that the CFTC limit the major swap participant designation to certain aspects of the person's activity.

a. Costs

The costs to a market participant from the proposed regulations further defining "major swap participant" would arise primarily from its need to analyze its swaps and determine whether it has a "substantial position" or "substantial counterparty exposure" as defined in the proposal. The proposed rule defines potential future exposure by a factor of the dollar notional value of the swap. The Commission also considered market-based tests of potential future exposure such as margin requirements or other valuations of the outstanding position. The Commission decided in favor of a more easily implementable test rather than market-based criteria for potential future exposure, given that daily variation in market prices is captured by the current exposure calculation. The CFTC believes that because the proposed quantitative thresholds are high, only very few market participants would have to conduct a detailed analysis to determine whether they are encompassed by the proposed

definition. The cost of the detailed analysis would vary for each market participant, depending on the particular characteristics of its swaps. Similarly, the costs to a market participant of determining whether it uses swaps to hedge or mitigate commercial risk would depend on how the market participant uses swaps. It is possible that for some market participants with complex positions in swaps, the costs of the analysis could be relatively high.

As is the case for the similar proposal regarding swap dealers, the costs of the voluntary process for a request for a limited designation as a major swap participant are difficult to predict because they would depend on the complexity of the particular case. The CFTC believes that the person making the request would have broad discretion in determining how to do so and thereby could control the costs of the request to some extent.

b. Benefits

The benefits of the proposed regulations further defining “major swap participant” include that they set out a quantitative, bright-line test that can be applied at a relatively low cost. Also, the definition of “hedging or mitigating commercial risk” is stated in general terms that may be flexibly applied by potential major swap participants. In preparing this proposal, the CFTC considered other methods of defining “major swap participant,” including multi-factor analyses, stress tests and adversary processes. The CFTC believes that these other methods would impose significantly higher costs for both the market participants that would have to apply them and for the CFTC (and, indirectly, the taxpayer), without providing additional benefits. The costs would result primarily from the need to retain qualified experts who would devote significant time and other resources to a detailed analysis of multiple aspects of the potential major swap participant’s swap positions. The benefits that could justify more costly proposals include reductions in arbitrary differences in results and greater consistency and predictability. However, other potential methods of further defining “major swap participant” do not appear likely to provide such benefits to an extent that would justify the higher costs.

5. Request for Comment

The CFTC invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the

costs and benefits of the proposed rules with their comments.

D. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”) ¹⁷⁴ the CFTC must advise the Office of Management and Budget as to whether the proposed rules constitute a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is “major,” its effectiveness will generally be delayed for 60 days pending Congressional review. We do not believe that any of the proposed rules, in their current form, would constitute a major rule.

We request comment on the potential impact of the proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VI. Administrative Law Matters—Exchange Act Rules (Definitions of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant”)

A. Paperwork Reduction Act Analysis

Certain provisions of the proposed rules may impose new “collection of information” requirements within the meaning of the Paperwork Reduction Act of 1995 (“PRA”). ¹⁷⁵ The SEC has submitted them to the Office of Management and Budget (“OMB”) for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is “Procedural Requirements Associated with the Definition of ‘Hedging or Mitigating Commercial Risk.’” An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has not yet assigned a control number to the new collection of information.

¹⁷⁴ Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

¹⁷⁵ 44 U.S.C. 3501 *et seq.*

1. Summary of Collection of Information

Proposed Exchange Act rule 3a67–4 would define the term “hedging or mitigating commercial risk.” ¹⁷⁶ Security-based swap positions that meet this proposed definition would be excluded from the “substantial position” analysis under the first test of the proposed definition of major security-based swap participant.

For a security-based swap position to be held for the purpose of hedging or mitigating commercial risk under proposed rule 3a67–4, the person holding the position must satisfy several conditions, including the following:

- (i) The person must identify and document the risks that are being reduced by the security-based swap position;
- (ii) The person must establish and document a method of assessing the effectiveness of the security-based swaps as a hedge; and
- (iii) The person must regularly assess the effectiveness of the security-based swap as a hedge.

2. Proposed Use of Information

The collections of information in proposed rule 3a67–4 are designed to help prevent abuse of the exclusion and to help ensure that the exclusion is only available to those entities that are engaged in legitimate hedging or risk mitigating activities.

3. Respondents

The collections of information in proposed rule 3a67–4 would apply to those entities seeking to exclude the security-based swap positions held for hedging or mitigating commercial risk from the substantial position calculation. As discussed below in Section VI.B.4., based on the current market, we estimate that approximately 10 entities have security-based swap positions of a magnitude that they could potentially reach the major security-based swap participant thresholds. Accordingly, we estimate that approximately 10 entities would seek to avail themselves of the exclusion from

¹⁷⁶ As noted previously, the concept of “hedging or mitigating commercial risk” also is found in the statutory provisions granting an exception to end-users from the mandatory clearing requirement in connection with swaps and security-based swaps. See CEA section 2(h)(7)(A); Exchange Act section 3C(g)(1)(B) (exception from mandatory clearing requirements when one or more counterparties are not “financial entities” and are using swaps or security-based swaps “to hedge or mitigate commercial risk”). If the proposed rule 3a67–4 definition of “hedging or mitigating commercial risk” is used any future SEC rulemakings, including rulemaking with respect to the end-user exception, any necessary discussion of administrative law matters relating to the use of proposed rule 3a67–4 will be provided at that time.

the substantial position calculation for security-based swap positions held for hedging or mitigating commercial risk.

4. Total Annual Reporting and Recordkeeping Burden

We do not anticipate that the proposed collection of information in proposed rule 3a67–4 would cause the estimated 10 entities to incur any new costs. We believe that only highly sophisticated market participants would potentially meet the proposed thresholds for the major security-based swap participant designation and thus have a need to take advantage of the exclusion for positions held for hedging or mitigating commercial risk (and be required to meet the attendant collection requirements). We understand from our staff's discussions with industry participants that the entities that have security-based swap positions and exposures of this magnitude currently create and maintain the documentation proposed to be required in rule 3a67–4, as part of their ordinary course business and risk management practices.¹⁷⁷ Thus, we do not believe that any new burdens or costs will be imposed on the approximately 10 entities that may seek to use the exclusion. We therefore estimate the total annual reporting and recordkeeping burden associated with proposed rule 3a67–4 to be minimal.

5. Collection of Information is Mandatory

The collections of information in proposed rule 3a67–4 would be mandatory for those entities seeking to exclude positions they hold for hedging or mitigating commercial risk from the substantial position calculation.

6. Confidentiality

There is no proposed requirement that the collections of information in proposed rule 3a67–4 be provided to the SEC or a third party on a regular, ordinary course basis. In a situation

where the SEC has obtained the information, the SEC would consider requests for confidential treatment on a case-by-case basis.

7. Record Retention Period

Proposed rule 3a67–4 does not contain a specific record retention requirement. Nonetheless, we would expect the approximately 10 entities that may seek to use the exclusion for positions held for hedging or mitigating commercial risk to maintain the records they create in connection with the exclusion. Because we understand from our staff's discussions with industry participants that the entities that have security-based swap positions and exposures of this magnitude currently create and maintain the documentation proposed to be required in rule 3a67–4, as part of their ordinary course business and risk management practices, we do not expect any new burdens or costs will be imposed to maintain the records.

8. Request for Comments

The SEC invites comments on these estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the SEC requests comments in order to: (a) Evaluate whether the collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility; (b) evaluate the accuracy of our estimate of the burden of the collection of information; (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (d) evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–39–10. Requests for materials submitted to OMB by the SEC with regard to this collection of information should be in writing, with reference to File No. S7–39–10, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 100 F Street, NE., Washington, DC 20549–1090. As OMB is required to

make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

B. Consideration of Benefits and Costs

1. Introduction

The Dodd-Frank Act added definitions of “security-based swap dealer” and “major security-based swap participant” to the Exchange Act in conjunction with other provisions that require entities meeting either of those definitions to register with the SEC and to be subject to capital, margin, business conduct and certain other requirements. Consistent with the direction of the Dodd-Frank Act, the SEC is proposing rules to further define “major security-based swap participant” along with additional terms used in that definition. The SEC also is proposing rules to further define “security-based swap dealer” and to set forth factors for determining the availability of the *de minimis* exception from that definition. We believe that these proposed rules are consistent with the purposes of the Dodd-Frank Act, and, as appropriate, set forth objective standards to facilitate market participants' compliance with the amendments that the Dodd-Frank Act made to the Exchange Act. Market participants, however, may incur costs associated with certain of these proposed rules.

The SEC believes that there would be two categories of potential costs. First, there would be costs associated with the regulatory requirements that would apply to a “security-based swap dealer” or a “major security-based swap participant” (*e.g.*, the registration, margin, capital, and business conduct requirements that would be imposed on security-based swap dealers and major security-based swap participants). While the specific costs and benefits associated with these regulatory requirements are being addressed in the SEC's proposals to implement those requirements, we recognize that the costs and benefits of these proposed definitions are directly linked to the costs and benefits of the requirements applicable to dealers and major participants. We welcome comment on the costs and benefits of these proposed definitions in that broader context.

Second, there may be costs that entities incur in determining whether they qualify as a “security-based swap dealer” or a “major security-based swap participant” under the proposed definitional rules. These costs, along

¹⁷⁷ Some entities follow these types of procedures so that their hedging transactions will qualify for hedge accounting treatment under generally accepted accounting principles, which requires procedures similar to those in proposed rule 3a67–4. Hedging relationships involving security-based swaps that qualify for the hedging or mitigating commercial risk exception in the proposed rule are not limited to those recognized as hedges for accounting purposes. We believe that all of the estimated 10 entities that have security-based swap positions of a magnitude that they could potentially be deemed to be major security-based swap participants already identify and document their risk management activities (including their security-based swap positions used to hedge or mitigate commercial risks) and assess the effectiveness of those activities as a matter of their ordinary business practice—even if they are not seeking hedge accounting treatment.

with the benefits associated with the proposed rules, are discussed below.

2. Proposed Exchange Act rule 3a67-1—Definition of “Major Security-Based Swap Participant”

Proposed Exchange Act rule 3a67-1 would largely restate the statutory definition of “major security-based swap participant,” to consolidate the definition and related interpretations for ease of reference.

A person that meets the definition of major security-based swap participant generally will be subject to the requirements applicable to major security-based swap participants without regard to the purpose for which it enters into a security-based swap, and without regard to the particular category of security-based swap.¹⁷⁸ However, the statutory definitions provide that a person may be designated as a major security-based swap participant for one or more categories of security-based swaps or for particular activities without being classified as a major security-based swap participant for all categories or activities.¹⁷⁹ Proposed rule 3a67-1 would provide that a major security-based swap participant that engages in significant activity with respect to only certain types, classes or categories of security-based swaps or only in connection with specified activities, could obtain relief with respect to other types of security-based swaps from certain of the requirements that are applicable to major security-based swap participants. The rule would have the benefit of implementing the statutory provision and providing that major security-based swap participants may obtain relief from the SEC. A person that seeks to be considered to be a major security-based swap participant only with respect to one category of security-based swaps, or only with respect to certain activities, would be expected to incur costs in connection with requesting an order from the SEC. However, any such costs would be voluntarily incurred by any person seeking to take advantage of that limited designation, and thus we preliminarily do believe that those costs would be attributable to the statute and not to this rule.

3. Proposed Exchange Act Rule 3a67-2—“Major” Categories of Security-Based Swaps

Proposed Exchange Act rule 3a67-2 would fulfill Congress’s mandate that

the SEC designate “major” categories of security-based swaps by setting forth two such “major” categories—one consisting of credit derivatives and the other consisting of equity-swaps and other security-based swaps. We believe that these proposed categories would have the benefit of being consistent with the different ways in which those products are used, as well as market statistics and current market infrastructures (particularly the separate trade warehouses for credit default swaps and equity swaps). Although, as discussed below, this categorization is relevant to the “substantial position” tests of the “major security-based swap participant” definition, we believe that the categorization itself would not impose any costs on market participants. While the categorization may affect the costs that market participants will incur from particular statutory and regulatory requirements applicable to major security-based swap participants,¹⁸⁰ those costs are being addressed in our proposals to implement those requirements.

4. Proposed Exchange Act Rule 3a76-3—Definition of “Substantial Position”

Proposed Exchange Act rule 3a67-3 would define the term “substantial position,” which is used in the first and third tests of the definition of “major security-based swap participant.” The Dodd-Frank Act requires the SEC to define this term. We have proposed two tests for identifying the presence of a substantial position—one test based on a daily average measure of uncollateralized mark-to-market exposure, and one based on a daily average measure of combined uncollateralized mark-to-market exposure and potential future exposure. Both of these daily measures would be calculated and averaged over a calendar quarter.

We believe that this proposed definition would have the benefit of providing objective criteria that reasonably would measure the risks associated with security-based swap positions, and reflect the counterparty risk and risk to the market factors that are embedded within the “major security-based swap participant” definition. We also believe that the proposed use of objective numerical criteria for the substantial position thresholds would promote the

predictable application and enforcement of the requirements governing major security-based swap participants by permitting market participants to readily evaluate whether their security-based swap positions meet the thresholds.

The first “substantial position” test would encompass entities that have a daily average uncollateralized mark-to-market exposure of \$1 billion in a major category of security-based swaps. The second “substantial position” test would encompass entities that have a daily average combined uncollateralized mark-to-market exposure and potential future exposure of \$2 billion. Potential future exposure would be measured, consistent with bank capital rules, largely by multiplying notional positions by risk factors. Additional adjustments would reflect netting agreements, the presence of central clearing and the presence of daily mark-to-market margining practices.

As previously noted, there will be costs associated with the registration, margin, capital, business conduct, and other requirements that will be imposed on major security-based swap participants. Those costs are being addressed in the SEC’s rule proposals to implement those requirements. We also believe that there will be costs incurred by entities in determining whether they meet the definition of major security-based swap participant. These costs are discussed below.

Based on the current over-the-counter derivatives market, we estimate that no more than 10 entities that are not otherwise security-based swap dealers would have either uncollateralized mark-to-market positions¹⁸¹ or

¹⁸¹ We believe that an estimate of an entity’s mark-to-market exposure associated with its security-based swap positions can be derived from the level of an entity’s notional positions. We recognize that the ratio of exposure to notional amount will vary by market participant and by position. We understand that mark-to-market exposures associated with credit derivative positions on average are equal to approximately three percent of an entity’s level of notional positions in credit derivatives. This estimate is based on second quarter 2010 U.S. bank market statistics involving credit derivatives, given that banks have credit derivative positions with gross positive fair value (which would equate to negative fair value for the banks’ counterparties) of \$403 billion, compared to total notional credit derivative positions of \$13.9 trillion. See Office of the Comptroller of the Currency, “OCC’s Quarterly Report on Bank Trading and Derivatives Activities” (Second Quarter 2010) at 4 & Table 12. This data suggests that, on average, an entity would need to have notional credit derivative positions of roughly \$33 billion to meet our proposed threshold for the first substantial position test, \$1 billion in mark-to-market exposure.

We understand, based on our staff’s discussions with industry, that approximately 39 entities have

Continued

¹⁷⁸ The specific costs associated with these regulatory requirements will be addressed in the SEC’s proposals to implement those requirements.

¹⁷⁹ See Exchange Act section 3(a)(67)(C).

¹⁸⁰ For example, distinguishing between categories of security-based swaps may cause some entities to incur additional costs to calculate their major security-based swap participant status with respect to each category. Similarly, categorization may affect whether an entity ultimately qualifies as a major security-based swap participant.

combined uncollateralized current exposure and potential future exposure of a magnitude¹⁸² that may rise close enough to the levels of our proposed thresholds to necessitate monitoring to determine whether they meet those thresholds. Additionally, we preliminarily believe that all of these approximately 10 entities currently maintain highly sophisticated financial operations in order to achieve the large security-based swap positions necessitating their use of the tests.

We expect the costs associated with the proposed substantial position tests to be modest for these entities. We understand that the entities that have this magnitude of security-based swap positions already monitor and collect all of the data necessary for the proposed substantial position tests. Preliminarily, we understand that these entities already use automated systems to gauge their positions and exposures and assist in their risk management. Accordingly, we estimate that each of the entities would incur a one-time programming cost,¹⁸³ as well as ongoing costs

credit default swap notional positions of roughly \$33 billion or above. We understand that the large majority of those entities are banks or hedge funds (which we would expect to fully collateralize their positions with dealers as a matter of course). We further understand that banks, securities firms, and hedge funds typically collateralize most or all of their mark-to-market exposure to U.S. banks as a matter of practice. See OCC's Quarterly Report on Bank Trading and Derivatives Activities (second quarter 2010) at 6. Therefore, it is not clear if any entities would have uncollateralized credit default swap positions near the proposed first substantial position threshold of \$1 billion uncollateralized outward exposure.

¹⁸² The proposed risk multiplier of 0.1 for credit derivatives would require an entity to have a notional position of \$20 billion in credit derivatives to reach the proposed \$2 billion potential future exposure threshold (even before accounting for netting adjustments). The proposed additional multiplier of 0.2 for security-based swaps cleared by a registered clearing agency or subject to daily mark-to-market margining would mean that an entity with credit derivative positions that are cleared or subject to daily mark-to-market margining would need a notional position in credit derivatives of at least \$100 billion to potentially reach the proposed \$2 billion potential future exposure threshold. In this example, we are assuming an uncollateralized outward exposure of zero.

We understand, based on our staff's discussions with industry, that there are approximately 10 non-dealer entities that have a notional position in credit derivatives of over \$50 billion.

¹⁸³ For each of the entities, we estimate that the initial programming would require the following levels of work from a Compliance Attorney, Compliance Manager, Programmer Analyst, Senior Internal Auditor, and Chief Financial Officer. The estimated contributions are as follows: approximately 2 hours of work from a Compliance Attorney to advise the entity's compliance department on the legal requirements associated with the proposed tests; approximately 8 hours of work from a Compliance Manager to assist a Programmer Analyst in making the necessary changes to the entity's existing automated system

associated with the continuing use and monitoring of the testing.¹⁸⁴ We estimate that the one-time programming cost would be approximately \$13,444 per entity, and \$134,440 for all entities.¹⁸⁵ We estimate that the annual ongoing costs would be approximately \$7,260 per entity, and \$72,600 for all entities.¹⁸⁶

5. Proposed Exchange Act Rule 3a67–4—Definition of “Hedging or Mitigating Commercial Risk”

Proposed Exchange Act rule 3a67–4 would define the term “hedging or mitigating commercial risk.” Security-based swap positions that meet that definition are excluded from the “substantial position” analysis under the

and to oversee and manage the entire programming process; approximately 40 hours of work from a Programmer Analyst to make the necessary programming changes to the existing automated system and to test the system; approximately 8 hours of work from a Senior Internal Auditor to perform quality assurance to ensure that the automated system is properly performing the proposed tests; and approximately 3 hours of work from the entity's Chief Financial Officer to monitor the process. We estimate that the hourly wage of a Compliance Attorney, Compliance Manager, Programmer Analyst, Senior Internal Auditor, and Chief Financial Officer would be approximately \$291, \$294, \$190, \$195, and \$450, respectively. The \$291/hour figure for a Compliance Attorney, the \$294/hour figure for a Compliance Manager, the \$190/hour figure for a Programmer Analyst, and the \$195/hour figure for a Senior Internal Auditor are from SIFMA's Management & Professional Earnings in the Securities Industry 2009, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. The \$450/hour figure for a Chief Financial Officer is from <http://www.payscale.com>, modified by SEC staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. See <http://www.payscale.com> (last visited Nov. 1, 2010).

¹⁸⁴ We anticipate that each entity would incur ongoing monitoring costs to evaluate their test results and to ensure that the tests are properly run. We estimate that each entity would have a Senior Internal Auditor spend approximately 4 hours each quarter (or a total of 16 hours annually) to perform this quality assurance. We also estimate that each entity would need a Compliance Attorney, a Compliance Manager, and its Chief Financial Officer to each spend approximately 1 hour each quarter (or a total of 4 hours annually) to monitor the entity's test results and the entity's status under the proposed rule.

¹⁸⁵ The estimated one-time programming cost of approximately \$13,444 per entity and \$134,440 for all entities was calculated as follows: (Compliance Attorney at \$291 per hour for 2 hours) + (Compliance Manager at \$294 per hour for 8 hours) + (Programmer Analyst at \$190 per hour for 40 hours) + (Senior Internal Auditor at \$195 per hour for 8 hours) + (Chief Financial Officer at \$450 per hour for 3 hours) × (10 entities) = \$134,440.

¹⁸⁶ The estimated ongoing monitoring cost of approximately \$7,260 per year per entity and \$72,600 per year for all entities was calculated as follows: (Senior Internal Auditor at \$195 per hour for 16 hours) (Compliance Attorney at \$291 per hour for 4 hours) + (Compliance Manager at \$294 per hour for 4 hours) + (Chief Financial Officer at \$450 per hour for 4 hours) × (10 entities) = \$72,600.

first test of the major participant definition. The proposed rule is intended to be objective and promote the predictable application and enforcement of the requirements governing major security-based swap participants.

For a security-based swap position to be held for the purpose of hedging or mitigating commercial risk under proposed Exchange Act rule 3a67–4, the person holding the position must satisfy certain conditions:

- (i) The person must identify and document the risks that are being reduced by the security-based swap position;
- (ii) The person must establish and document a method of assessing the effectiveness of the security-based swap as a hedge; and
- (iii) The person must regularly assess the effectiveness of the security-based swap as a hedge.

Proposed rule 3a67–4 would affect whether an entity will meet the definition of major security-based swap participant. The specific costs associated with these regulatory requirements are being addressed in the SEC's proposals to implement those requirements.

While we expect that there could be some potential costs associated with the procedural requirements of proposed rule 3a67–4, as described in Section VI.B.4., *supra*, we expect only highly sophisticated entities to hold security-based swap positions of a magnitude that would require use of the proposed tests. Thus, we do not anticipate that these proposed procedural requirements would cause market participants to incur costs that they do not incur already as a matter of their ordinary business and risk management practices. Accordingly, we do not expect that the proposed definition of “hedging or mitigating commercial risk” would impose any costs on the potentially affected entities beyond those already regularly incurred by these entities as a matter of course.

6. Proposed Exchange Act Rule 3a67–5—Definition of “Substantial Counterparty Exposure That Could Have Serious Adverse Effects on The Financial Stability of The United States Banking System or Financial Markets”

Proposed Exchange Act rule 3a67–5 would define “substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets,” a term that comprises part of the second test of the “major security-based swap participant” definition. This proposed rule would

parallel the “substantial position” analysis discussed above, but would examine an entity’s security-based swap positions as a whole (rather than focusing on a particular “major” category), and would not exclude certain hedging positions. Consistent with this broader scope, and the proposal that there be two “major” categories of security-based swaps, the thresholds used in this test would be two times the comparable “substantial position” thresholds. We believe that this approach reasonably would measure the counterparty exposure associated with the entirety of an entity’s security-based swap positions, consistent with the risk factors in the “major security-based swap participant” definition. Additionally, we believe that the proposed definition would provide objective criteria and promote the predictable application and enforcement of the requirements governing major security-based swap participants by permitting market participants to readily evaluate whether their security-based swap positions meet the proposed thresholds.

We believe that the same approximately 10 entities would calculate their substantial counterparty exposure under this rule as would undertake the substantial position calculation under proposed rule 3a67–3. Given that the threshold for this proposed rule is derived from the calculations of substantial position that would be mandated by proposed rule 3a67–3, we do not anticipate that it would create any costs outside of those already covered in the discussion of the estimated costs associated with the proposed definition of substantial position.

7. Proposed Exchange Act Rule 3a67–6—Definitions of “Financial Entity” and “Highly Leveraged”

Proposed Exchange Act rule 3a67–6 would define the terms “financial entity” and “highly leveraged,” both of which are used in the third test of the “major security-based swap participant” definition. The proposed definition of “financial entity” would be consistent with the use of that term in the Title VII exception from mandatory clearing for end-users of security-based swaps (subject to limited technical changes). One of the two alternative proposed definitions of “highly leveraged” would be consistent with a standard used in Title I of the Dodd-Frank Act, while the other alternative is based on an understanding of typical leverage ratios for certain financial entities. We believe that these proposed alternative standards would apply reasonable

objective criteria to implement and further define the third test. Additionally, we believe that the proposed use of these objective definitions and numerical criteria would promote the predictable application and enforcement of the requirements governing major security-based swap participants by permitting market participants to readily evaluate whether they meet the threshold for major security-based swap participant status.

We do not believe that the proposed definition of “financial entity” would impose any significant costs on market entities, given the objective nature of the definition. We also do not believe that the proposed definition of “highly leveraged”—a balance sheet test that would be based on the ratio of an entity’s liabilities and equity, and that, in the case of entities subject to public reporting requirements, could be derived from financial statements filed with the SEC—would impose any significant costs on entities that have security-based swap positions large enough to potentially meet the “substantial position” requirement that is part of the third test.

8. Proposed Exchange Act Rule 3a67–7—Timing Requirements, Reevaluation Period and Termination of Status

Proposed Exchange Act rule 3a67–7 would set forth methods for specifying when an entity that satisfies the tests specified within the definition of “major security-based swap participant” would be deemed to meet that definition. The proposed rule also would address the termination of an entity’s status as a major security-based swap participant. We believe that the proposed rule would set forth pragmatic standards for permitting entities that have security-based swap positions that require registration to go through the registration process, and to terminate their status when appropriate. We believe that this proposed rule would impose no direct costs on market entities.¹⁸⁷

9. Proposed Exchange Act Rule 3a71–1—Definition of “Security-Based Swap Dealer”

Proposed Exchange Act rule 3a71–1 largely would restate the statutory definition of “security-based swap dealer,” to consolidate the definition and related interpretations for market

participants’ ease of reference. We are not proposing to further define the four specific tests set forth in the “security-based swap dealer” definition. However, our release contains interpretive language that would have the benefit of providing additional legal certainty to market participants. While market participants would incur certain costs to analyze whether their security-based swap activities cause them to be on the “dealer” side of the dealer-trader distinction (which would require them to register with the SEC and comply with the other requirements applicable to security-based swap dealers unless they can take advantage of the *de minimis* exception), these costs would be incurred because of the statutory change, rather than due to proposed rule 3a71–1. The Dodd-Frank Act determined that persons that engage in dealing activities involving security-based swaps should be subject to comprehensive regulation, and any such analytic costs arise from Congress’s determination to amend the Exchange Act.¹⁸⁸

10. Proposed Exchange Act Rule 3a71–2—*de Minimis* Exception

Proposed Exchange Act rule 3a71–2 would set forth factors for determining whether a person that otherwise would be a security-based swap dealer can take advantage of the *de minimis* exception. The Dodd-Frank Act directed the SEC to promulgate these factors.¹⁸⁹ The proposed factors would account for an entity’s annual notional security-based swap positions in a dealing capacity, its total notional security-based swap positions in a dealing capacity when the counterparty is a “special entity,”¹⁹⁰ and its total number of counterparties and security-based swaps as a dealer. We believe that these factors appropriately would focus on dealing activities that do not warrant an entity’s regulation as a security-based swap dealer. We also believe that these objective numerical criteria for the *de minimis* exception would promote the predictable application and enforcement of the *de minimis* exception from security-based swap dealer status.

In general, we would expect a person that enters into security-based swaps in a dealing capacity would, as a matter of course, be aware of the notional amount

¹⁸⁸ Based on our staff’s discussions with industry, we estimate that approximately 50 entities may be required to register as security-based swap dealers following implementation of these proposed rules. The specific costs associated with these regulatory requirements will be addressed in the SEC’s proposals to implement those requirements.

¹⁸⁹ See Section 761(a)(6) of the Dodd-Frank Act.

¹⁹⁰ See Section 15F(h)(2)(C) of the Exchange Act.

¹⁸⁷ As noted above, we recognize that major security-based swap participants will incur costs associated with the registration and termination of registration processes. These costs will be addressed in the SEC rule’s proposals to implement those requirements.

of those positions, whether a particular counterparty is a “special entity,” and the total number of counterparties and security-based swaps it has in a dealer capacity. As a result, we believe that there would be no new costs incurred by entities in assessing the availability of the *de minimis* exception. Moreover, any costs associated with ensuring that a person can take advantage of the *de minimis* exception would be voluntarily incurred by entities that engage in dealing activities that seek to take advantage of the exception.

11. Request for Comments

The SEC requests comment on these estimated benefits and costs. Commenters particularly are requested to address: the accuracy of our estimate that there would be approximately 10 entities in the market (that would not otherwise be security-based swap dealers) that would have security-based swap positions of a magnitude that may rise close enough to the levels of our proposed thresholds to necessitate monitoring to determine whether they meet those thresholds; the accuracy of our estimate that there would be approximately 50 entities in the market that may be required to register as security-based swap dealers following implementation of the proposed rules; the accuracy of our estimates of the costs associated with entities performing the proposed substantial position tests; whether the entities that have security-based swap positions that are significant enough to potentially meet one or more of the tests in the “major security-based swap participant” definition would, as a matter of course, already have the data necessary to perform the two proposed substantial position tests, and if not, what additional data would they need and how much time and expense would gathering that data require; whether these same entities would, as a matter of course, already comply with the proposed procedural requirements associated with the exclusion for positions that are for the purpose of “hedging or mitigating commercial risk;” and whether entities would change their behavior to avoid meeting the proposed definitions of “security-based swap dealer” or “major security-based swap participant,” and if so, what, if any, economic costs would be associated with such behavioral changes.

In addition, and more generally, we request comment on the costs and benefits of these proposed definitions in the broader context of the substantive rules, including capital, margin and business conduct rules, applicable to dealers and major participants.

Commenters particularly are requested to address whether the proposed scope of the dealer and major participant definitions are appropriate in light of the costs and benefits associated with those substantive rules.

C. Consideration of Burden on Competition, and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the SEC, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.¹⁹¹ In addition, Section 23(a)(2) of the Exchange Act¹⁹² requires the SEC, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) of the Exchange Act also prohibits the SEC from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

We preliminarily do not believe that the proposed rules would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. We are proposing rules to further define “major security-based swap participant,” along with several terms used in that definition. We are also proposing rules to further define “security-based swap dealer” and to set forth factors for determining the availability of the *de minimis* exception from that definition. We believe that the proposed rules are consistent with the purposes of Title VII of the Dodd-Frank Act, and, as appropriate, set forth objective standards to facilitate market participants’ compliance with the amendments that Title VII of the Dodd-Frank Act made to the Exchange Act. These amendments mandate that the SEC regulate major security-based swap participants and security-based swap dealers, which include some, but not all, entities that enter into security-based swaps. Although regulation of certain security-based swap market participants may result in competitive burdens to these entities when compared to unregulated security-based swap market participants, these burdens stem directly from Congress’s decision to impose regulation on a specified set of security-based swap market participants through the Dodd-Frank Act.

¹⁹¹ 15 U.S.C. 78c(f).

¹⁹² 15 U.S.C. 78w(a)(2).

While our decisions on how to further define the terms may have some effect on competition (e.g., our determinations regarding the proposed definition of substantial position will affect whether entities qualify as major security-based swap participants), we preliminarily do not believe that our decisions would impose additional competitive burdens on entities outside of those that Congress previously imposed through its decision in Title VII of the Dodd-Frank Act to regulate and differentiate security-based swap market participants. Moreover, we believe that defining substantial position will help provide market participants with legal certainty regarding their need to register as major security-based swap participants and is necessary and appropriate to implement the purposes of regulating security-based swap dealers and major security-based swap participants.

We also preliminarily believe that the proposed rules would promote efficiency. We believe that the proposed rules would set forth clear objective standards to facilitate market participants’ compliance with the amendments that the Dodd-Frank Act made to the Exchange Act. Moreover, we believe that the proposed rules would promote the predictable application and enforcement of the Exchange Act. We also have considered what effect, if any, our proposed rules would have on capital formation. We preliminarily do not believe that our proposed rules would have a negative effect on capital formation.

The SEC requests comment on the effect of the proposed rules on efficiency, competition, and capital formation. Commenters are particularly requested to address whether entities would change their behavior to avoid meeting the proposed definitions of “security-based swap dealer” or “major security-based swap participant,” and if so, how. Commenters are also requested to address the effect, if any, that the proposed definitions of “substantial position,” “hedging or mitigating commercial risk,” “substantial counterparty exposure,” “financial entity,” or “highly leveraged,” or the proposed categories of security-based swaps would have on business decisions, trading behavior, transaction costs, or capital allocation. We also request comment on the effect, if any that the proposed *de minimis* exception to the definition of security-based swap dealer would have on business decisions, trading behavior, transaction costs, or capital allocation, and if so, how. Commenters are particularly

encouraged to provide quantitative information to support their views.

D. Consideration of Impact on the Economy

For purposes of SBREFA, the SEC must advise the Office of Management and Budget as to whether the proposed rules constitute a “major” rule. Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in: (1) An annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease); (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effect on competition, investment or innovation. If a rule is “major,” its effectiveness will generally be delayed for 60 days pending Congressional review. We do not believe that any of the proposed rules, in their current form, would constitute a major rule.

We request comment on the potential impact of the proposed rules on the economy on an annual basis, on the costs or prices for consumers or individual industries, and on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

E. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (“RFA”) ¹⁹³ requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) ¹⁹⁴ of the Administrative Procedure Act, ¹⁹⁵ as amended by the RFA, generally requires the SEC to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on “small entities.” ¹⁹⁶ Section 605(b) of the RFA provides that this requirement shall not apply to any proposed rule or proposed rule amendment, which if adopted, would not have a significant economic impact on a substantial number of small entities. ¹⁹⁷

For purposes of SEC rulemaking in connection with the RFA, a small entity includes: (i) When used with reference to an “issuer” or a “person,” other than an investment company, an “issuer” or “person” that, on the last day of its most recent fiscal year, had total assets of \$5 million or less, ¹⁹⁸ or (ii) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a-5(d) under the Exchange Act, ¹⁹⁹ or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. ²⁰⁰ Under the standards adopted by the Small Business Administration, small entities in the finance and insurance industry include the following: (i) For entities engaged in credit intermediation and related activities, entities with \$175 million or less in assets; ²⁰¹ (ii) for entities engaged in non-depository credit intermediation and certain other activities, entities with \$7 million or less in annual receipts; ²⁰² (iii) for entities engaged in financial investments and related activities, entities with \$7 million or less in annual receipts; ²⁰³ (iv) for insurance carriers and entities engaged in related activities, entities with \$7 million or less in annual receipts; ²⁰⁴ and (v) for funds, trusts, and other financial vehicles, entities with \$7 million or less in annual receipts. ²⁰⁵

Based on feedback from industry participants about the security-based swap markets, the SEC preliminarily believes that entities that would qualify as security-based swap dealers and major security-based swap market participants, whether registered broker-dealers or not, exceed the thresholds defining “small entities” set out above. Thus, the SEC believes it is unlikely that the proposed rules would have a significant economic impact any small entity.

For the foregoing reasons, the SEC certifies that the proposed rules would not have a significant economic impact

on a substantial number of small entities for purposes of the RFA.

The SEC encourages written comments regarding this certification. The SEC requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

VII. Statutory Basis and Rule Text

List of Subjects

17 CFR Part 1

Definitions.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Commodity Futures Trading Commission

Text of Proposed Rules

For the reasons stated in this release, the CFTC is proposing to amend 17 CFR part 1 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. The authority citation for part 1 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23, and 24, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

2. Amend § 1.3 by:

- a. Adding paragraph (m); and
- b. As proposed to be amended at 75 FR 63762, October 18, 2010, and 75 FR 77576, December 13, 2010, adding (ppp) through (vvv) to read as follows:

§ 1.3 Definitions

* * * * *

(m) *Eligible contract participant*. This term has the meaning set forth in Section 1a(18) of the Commodity Exchange Act, except that:

(1) A major swap participant, as defined in Section 1a(33) of the Commodity Exchange Act and § 1.3(qqq), is an eligible contract participant;

(2) A swap dealer, as defined in Section 1a(49) of the Commodity Exchange Act and § 1.3(ppp), is an eligible contract participant;

(3) A major security-based swap participant, as defined in Section 3(a)(67) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(67)) and § 240.3a67-1 of this title, is an eligible contract participant;

(4) A security-based swap dealer, as defined in Section 3(a)(71) of the

¹⁹³ 5 U.S.C. 601 *et seq.*

¹⁹⁴ 5 U.S.C. 603(a).

¹⁹⁵ 5 U.S.C. 551 *et seq.*

¹⁹⁶ Although Section 601(b) of the RFA defines the term “small entity,” the statute permits the Commissions to formulate their own definitions. The SEC has adopted definitions for the term small entity for the purposes of SEC rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10. *See* Securities Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982) (File No. AS-305).

¹⁹⁷ *See* 5 U.S.C. 605(b).

¹⁹⁸ *See* 17 CFR 240.0-10(a).

¹⁹⁹ *See* 17 CFR 240.17a-5(d).

²⁰⁰ *See* 17 CFR 240.0-10(c).

²⁰¹ *See* 13 CFR 121.201 (Subsector 522).

²⁰² *See id.* at Subsector 522.

²⁰³ *See id.* at Subsector 523.

²⁰⁴ *See id.* at Subsector 524.

²⁰⁵ *See id.* at Subsector 525.

Securities and Exchange Act of 1934 (15 U.S.C. 78c(a)(71)) and § 240.3a71–1 of this title, is an eligible contract participant;

(5) A commodity pool with one or more direct or indirect participants that is not an eligible contract participant is not an eligible contract participant for purposes of Sections 2(c)(2)(B)(vi) and 2(c)(2)(C)(vii) of the Commodity Exchange Act; and

(6) A commodity pool that does not have total assets exceeding \$5,000,000 or that is not operated by a person described in clause (A)(iv)(II) of Section 1a(18) of the Commodity Exchange Act is not an eligible contract participant pursuant to clause (A)(v) of such Section.

* * * * *

(ppp) *Swap Dealer*. (1) In general. The term “*swap dealer*” means any person who:

(i) Holds itself out as a dealer in swaps;

(ii) Makes a market in swaps;

(iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or

(iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.

(2) *Exception*. The term “*swap dealer*” does not include a person that enters into swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(3) *Scope*. A person who is a swap dealer shall be deemed to be a swap dealer with respect to each swap it enters into, regardless of the category of the swap or the person’s activities in connection with the swap. However, if a person makes an application to limit its designation as a swap dealer to specified categories of swaps or specified activities of the person in connection with swaps, the Commission shall determine whether the person’s designation as a swap dealer shall be so limited. A person may make such application to limit its designation at the same time as, or at a later time subsequent to, the person’s initial registration as a swap dealer.

(4) *De minimis exception*. A person shall not be deemed to be a swap dealer as a result of swap dealing activity involving counterparties that meets each of the following conditions:

(i) The swap positions connected with those activities into which the person enters over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than \$100 million, and have an aggregate gross notional amount of no

more than \$25 million with regard to swaps in which the counterparty is a “special entity” (as that term is defined in Section 4s(h)(2)(C) of the Commodity Exchange Act). For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

(ii) The person has not entered into swaps in connection with those activities with more than 15 counterparties, other than swap dealers, over the course of the immediately preceding 12 months. In determining the number of counterparties, all counterparties that are members of a single group of persons under common control shall be considered to be a single counterparty.

(iii) The person has not entered into more than 20 swaps in connection with those activities over the course of the immediately preceding 12 months. For purposes of this paragraph, each transaction entered into under a master agreement for swaps shall constitute a distinct swap, but entering into an amendment of an existing swap in which the counterparty to such swap remains the same and the item underlying such swap remains substantially the same shall not constitute entering into a swap.

(5) *Insured depository institution swaps in connection with originating loans to customers*. Swaps entered into by an insured depository institution with a customer in connection with originating a loan with that customer shall not be considered in determining whether such person is a swap dealer.

(i) A swap shall be considered to have been entered into in connection with originating a loan only if the rate, asset, liability or other notional item underlying such swap is, or is directly related to, a financial term of such loan. The financial terms of a loan include, without limitation, the loan’s duration, rate of interest, the currency or currencies in which it is made and its principal amount.

(ii) An insured depository institution shall be considered to have originated a loan with a customer if the insured depository institution:

(A) Directly transfers the loan amount to the customer;

(B) Is a part of a syndicate of lenders that is the source of the loan amount that is transferred to the customer;

(C) Purchases or receives a participation in the loan; or

(D) Otherwise is the source of funds that are transferred to the customer

pursuant to the loan or any refinancing of the loan.

(iii) The term *loan* shall not include:

(A) Any transaction that is a sham, whether or not intended to qualify for the exclusion from the definition of the term *swap dealer* in this rule; or

(B) Any synthetic loan, including without limitation a loan credit default swap or loan total return swap.

(qqq) *Major Swap Participant*. (1) *In general*. The term *major swap participant* means any person:

(i) That is not a swap dealer; and

(ii)(A) That maintains a substantial position in swaps for any of the major swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(B) Whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(C) That is a financial entity that:

(1) Is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency (as defined in Section 1a(2) of the Commodity Exchange Act); and

(2) Maintains a substantial position in outstanding swaps in any major swap category.

(2) *Scope of designation*. A person that is a major swap participant shall be deemed to be a major swap participant with respect to each swap it enters into, regardless of the category of the swap or the person’s activities in connection with the swap. However, if a person makes an application to limit its designation as a major swap participant to specified categories of swaps or specified activities of the person in connection with swaps, the Commission shall determine whether the person’s designation as a major swap participant shall be so limited. A person may make such application to limit its designation at the same time as, or at a later time subsequent to, the person’s initial registration as a major swap participant.

(3) *Timing requirements*. A person that is not registered as a major swap participant, but that meets the criteria in this rule to be a major swap participant as a result of its swap activities in a

fiscal quarter, will not be deemed to be a major swap participant until the earlier of the date on which it submits a complete application for registration as a major swap participant or two months after the end of that quarter.

(4) *Reevaluation period.*

Notwithstanding paragraph (qqq)(3) of this section, if a person that is not registered as a major swap participant meets the criteria in this rule to be a major swap participant in a fiscal quarter, but does not exceed any applicable threshold by more than twenty percent in that quarter:

(i) That person will not immediately be subject to the timing requirements specified in paragraph (qqq)(3) of this section; but

(ii) That person will become subject to the timing requirements specified in paragraph (3) at the end of the next fiscal quarter if the person exceeds any of the applicable daily average thresholds in that next fiscal quarter.

(5) *Termination of status.* A person that is deemed to be a major swap participant shall continue to be deemed a major swap participant until such time that its swap activities do not exceed any of the daily average thresholds set forth within this rule for four consecutive fiscal quarters after the date on which the person becomes registered as a major swap participant.

(rrr) *Category of swaps; major swap category.* For purposes of Sections 1a(33) and 1a(49) of the Commodity Exchange Act and §§ 1.3(ppp) and 1.3(qqq), the terms *major swap category*, *category of swaps* and any similar terms mean any of the categories of swaps listed below. For the avoidance of doubt, the term *swap* as it is used in this § 1.3(rrr) has the meaning set forth in Section 1a(47) of the Commodity Exchange Act and the rules thereunder.

(1) *Rate swaps.* Any swap which is primarily based on one or more reference rates, including but not limited to any swap of payments determined by fixed and floating interest rates, currency exchange rates, inflation rates or other monetary rates, any foreign exchange swap, as defined in Section 1a(25) of the Commodity Exchange Act, and any foreign exchange option.

(2) *Credit swaps.* Any swap that is primarily based on instruments of indebtedness, including but not limited to any swap primarily based on one or more broad-based indices related to debt instruments, and any swap that is an index credit default swap or total return swap on one or more indices of debt instruments.

(3) *Equity swaps.* Any swap that is primarily based on equity securities,

including but not limited to any swap based on one or more broad-based indices of equity securities and any total return swap on one or more equity indices.

(4) *Other commodity swaps.* Any swap that is not included in the rate swap, credit swap or equity swap categories.

(sss) *Substantial position.* (1) *In general.* For purposes of Section 1a(33) of the Commodity Exchange Act and § 1.3(qqq), the term *substantial position* means swap positions, other than positions that are excluded from consideration, that equal or exceed any of the following thresholds in the specified major category of swaps:

(i) For rate swaps:

(A) \$3 billion in daily average aggregate uncollateralized outward exposure; or

(B) \$6 billion in:

(1) Daily average aggregate uncollateralized outward exposure plus

(2) Daily average aggregate potential outward exposure.

(ii) For credit swaps:

(A) \$1 billion in daily average aggregate uncollateralized outward exposure; or

(B) \$2 billion in:

(1) Daily average aggregate uncollateralized outward exposure plus

(2) Daily average aggregate potential outward exposure.

(iii) For equity swaps:

(A) \$1 billion in daily average aggregate uncollateralized outward exposure; or

(B) \$2 billion in:

(1) Daily average aggregate uncollateralized outward exposure plus

(2) Daily average aggregate potential outward exposure.

(iv) For other commodity swaps:

(A) \$1 billion in daily average aggregate uncollateralized outward exposure; or

(B) \$2 billion in:

(1) Daily average aggregate uncollateralized outward exposure plus

(2) Daily average aggregate potential outward exposure.

(2) *Aggregate uncollateralized outward exposure.* (i) *In general.*

Aggregate uncollateralized outward exposure in general means the sum of the current exposure, obtained by marking-to-market using industry standard practices, of each of the person's swap positions with negative value in a major swap category, less the value of the collateral the person has posted in connection with those positions.

(ii) *Calculation of aggregate uncollateralized outward exposure.* In calculating this amount the person

shall, with respect to each of its swap counterparties in a given major swap category:

(A) Determine the dollar value of the aggregate current exposure arising from each of its swap positions with negative value (subject to the netting provisions described below) in that major category by marking-to-market using industry standard practices; and

(B) Deduct from that dollar amount the aggregate value of the collateral the person has posted with respect to the swap positions. The aggregate uncollateralized outward exposure shall be the sum of those uncollateralized amounts across all of the person's swap counterparties in the applicable major category.

(iii) *Relevance of netting agreements.*

(A) If the person has a master netting agreement in effect with a particular counterparty, the person may measure the current exposure arising from its swaps in any major category on a net basis, applying the terms of the agreement. Calculation of net exposure may take into account offsetting positions entered into with that particular counterparty involving swaps (in any swap category) as well as security-based swaps and securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements), to the extent these are consistent with the offsets permitted by the master netting agreement.

(B) Such adjustments may not take into account any offset associated with positions that the person has with separate counterparties.

(3) *Aggregate potential outward exposure.* (i) *In general.* Aggregate potential outward exposure in any major swap category means the sum of:

(A) The aggregate potential outward exposure for each of the person's swap positions in a major swap category that are not subject to daily mark-to-market margining and are not cleared by a registered clearing agency or derivatives clearing organization, as calculated in accordance with paragraph (sss)(3)(ii); and

(B) The aggregate potential outward exposure for each of the person's swap positions in such major swap category that are subject to daily mark-to-market margining and are cleared by a registered clearing agency or derivatives clearing organization, as calculated in accordance with paragraph (sss)(3)(iii) of this section.

(ii) *Calculation of potential outward exposure for swaps that are not subject to daily mark-to-market margining and are not cleared by a registered clearing*

agency or derivatives clearing organization. (A) *In general.* (1) For positions in swaps that are not subject to daily mark-to-market margining and are not cleared by a registered clearing agency or a derivatives clearing organization, potential outward

exposure equals the total notional principal amount of those positions, adjusted by the following multipliers on a position-by-position basis reflecting the type of swap. For any swap that does not appropriately fall within any of the specified categories, the “other

commodities” conversion factors are to be used. If a swap is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the swap is zero, the remaining maturity equals the time until the next reset date.

TABLE TO § 1.3 (SSS)—CONVERSION FACTOR MATRIX FOR SWAPS

Residual maturity	Interest rate	Foreign exchange rate and gold	Precious metals (except gold)	Other commodities
One year or less	0.00	0.01	0.07	0.10
Over one to five years	0.005	0.05	0.07	0.12
Over five years	0.015	0.075	0.08	0.15

Residual maturity	Credit	Equity
One year or less	0.10	0.06
Over one to five years	0.10	0.08
Over five years	0.10	0.10

(2) Use of effective notional amounts. If the stated notional amount on a position is leveraged or enhanced by the structure of the position, the calculation in paragraph (sss)(3)(ii)(A)(1) of this section shall be based on the effective notional amount of the position rather than on the stated notional amount.

(3) Exclusion of certain positions. The calculation in paragraph (sss)(3)(ii)(A)(1) of this section shall exclude:

(i) Positions that constitute the purchase of an option, such that the person has no additional payment obligations under the position; and

(ii) Other positions for which the person has prepaid or otherwise satisfied all of its payment obligations.

(4) Adjustment for certain positions. Notwithstanding paragraph (sss)(3)(ii)(A)(1) of this section, the potential outward exposure associated with a position by which a person buys credit protection using a credit default swap or index credit default swap is capped at the net present value of the unpaid premiums.

(B) Adjustment for netting agreements. Notwithstanding paragraph (sss)(3)(ii)(A) of this section, for positions subject to master netting agreements the potential outward exposure associated with the person's swaps with each counterparty equals a weighted average of the potential outward exposure for the person's swaps with that counterparty as calculated under paragraph (sss)(3)(ii)(A), and that amount reduced by the ratio of net current exposure to gross current exposure, consistent with the following equation as calculated on a counterparty-by-counterparty basis:

$$P_{Net} = 0.4 * P_{Gross} + 0.6 * NGR * P_{Gross}$$

Note to paragraph (sss)(3)(ii)(B): P_{Net} is the potential outward exposure, adjusted for bilateral netting, of the person's swaps with a particular counterparty; P_{Gross} is that potential outward exposure without adjustment for bilateral netting; and NGR is the ratio of net current exposure to gross current exposure.

(iii) *Calculation of potential outward exposure for swaps that are subject to daily mark-to-market margining or are cleared by a registered clearing agency or derivatives clearing organization.* For positions in swaps that are subject to daily mark-to-market margining or cleared by a registered clearing agency or derivatives clearing organization:

(A) Potential outward exposure equals the potential exposure that would be attributed to such positions using the procedures in paragraph (sss)(3)(ii) of this section multiplied by 0.2.

(B) For purposes of this calculation, a swap shall be considered to be subject to daily mark-to-market margining if, and for so long as, the counterparties follow the daily practice of exchanging collateral to reflect changes in the current exposure arising from the swap (after taking into account any other financial positions addressed by a netting agreement between the counterparties. If the person is permitted by agreement to maintain a threshold for which it is not required to post collateral, the total amount of that threshold (regardless of the actual exposure at any time) shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (sss)(1)(i)(B), (ii)(B), (iii)(B) or (iv)(B) of this section, as applicable. If the minimum transfer amount under the agreement is in excess of \$1 million, the entirety of the minimum transfer

amount shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (sss)(1)(i)(B), (ii)(B), (iii)(B) or (iv)(B), as applicable.

(4) Calculation of daily average. Measures of daily average aggregate uncollateralized outward exposure and daily average aggregate potential outward exposure shall equal the arithmetic mean of the applicable measure of exposure at the close of each business day, beginning the first business day of each calendar quarter and continuing through the last business day of that quarter.

(ttt) *Hedging or mitigating commercial risk.* For purposes of Section 1a(33) of the Commodity Exchange Act and § 1.3(qqq), a swap position shall be deemed to be held for the purpose of hedging or mitigating commercial risk when:

(1) Such position:

(i) Is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise, where the risks arise from:

(A) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(B) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or

(C) The potential change in the value of services that a person provides, purchases, or reasonably anticipates

providing or purchasing in the ordinary course of business of the enterprise;

(D) The potential change in the value of assets, services, inputs, products, or commodities that a person owns, produces, manufactures, processes, merchandises, leases, or sells, or reasonably anticipates owning, producing, manufacturing, processing, merchandising, leasing, or selling in the ordinary course of business of the enterprise;

(E) Any potential change in value related to any of the foregoing arising from foreign exchange rate movements associated with such assets, liabilities, services, inputs, products, or commodities; or

(F) Any fluctuation in interest, currency, or foreign exchange rate exposures arising from a person's current or anticipated assets or liabilities; or

(ii) Qualifies as bona fide hedging for purposes of an exemption from position limits under the Commodity Exchange Act; or

(iii) Qualifies for hedging treatment under Financial Accounting Standards Board Accounting Standards Codification Topic 815, Derivatives and Hedging (formerly known as Statement No. 133); and

(2) Such position is:

(i) Not held for a purpose that is in the nature of speculation, investing or trading;

(ii) Not held to hedge or mitigate the risk of another swap or securities-based swap position, unless that other position itself is held for the purpose of hedging or mitigating commercial risk as defined by this rule or § 240.3a67-4 of this title.

(uuu) Substantial counterparty exposure. (1) *In general.* For purposes of Section 1a(33) of the Act and § 1.3(qqq), the phrase *substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets* means a swap position that satisfies either of the following thresholds:

(i) \$5 billion in daily average aggregate uncollateralized outward exposure; or

(ii) \$8 billion in:

(A) Daily average aggregate uncollateralized outward exposure plus
(B) Daily average aggregate potential outward exposure.

(2) Calculation methodology. For these purposes, the terms "daily average aggregate uncollateralized outward exposure" and "daily average aggregate potential outward exposure" have the same meaning as in § 1.3(sss), except that these amounts shall be calculated

by reference to all of the person's swap positions, rather than by reference to a specific major swap category.

(vvv) *Financial entity; highly leveraged.* (1) For purposes of Section 1a(33) of the Commodity Exchange Act and § 1.3(qqq), the term "*financial entity*" means:

(i) A security-based swap dealer;

(ii) A major security-based swap participant;

(iii) A commodity pool as defined in Section 1a(10) of the Commodity Exchange Act;

(iv) A private fund as defined in Section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a));

(v) An employee benefit plan as defined in paragraphs (3) and (32) of Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); and

(vi) A person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in Section 4(k) of the Bank Holding Company Act of 1956.

(2) For purposes of Section 1a(33) of the Commodity Exchange Act and § 1.3(qqq), the term "*highly leveraged*" means the existence of a ratio of an entity's total liabilities to equity in excess of [8 to 1 or 15 to 1] as measured at the close of business on the last business day of the applicable fiscal quarter. For this purpose, liabilities and equity should each be determined in accordance with U.S. generally accepted accounting principles.

Securities and Exchange Commission

Pursuant to the Exchange Act, 15 U.S.C. 78a *et seq.*, and particularly, Sections 3 and 23 thereof, and Sections 712 and 761(b) of the Dodd-Frank Act, the SEC is proposing to adopt Rules 3a67-1, 3a67-2, 3a67-3, 3a67-4, 3a67-5, 3a67-6, 3a67-7, 3a71-1, and 3a71-2 under the Exchange Act.

Text of Proposed Rules

For the reasons stated in the preamble, the SEC is proposing to amend Title 17, Chapter II of the Code of the Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 is amended by adding the following citation in numerical order:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78o, 78o-4, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-

3, 80b-4, 80b-11, and 7201 *et seq.*, 18 U.S.C. 1350; and 12 U.S.C. 5221(e)(3), unless otherwise noted.

* * * * *

Sections 3a67-1 through 3a67-7 and sections 3a71-1 and 3a71-2 are also issued under Pub. L. 111-203, §§ 712, 761(b), 124 Stat. 1841 (2010).

* * * * *

2. Add §§ 240.3a67-1 through 240.3a67-7 and §§ 240.3a71-1, 240.3a71-2 to read as follows:

* * * * *

Sec.

240.3a67 1—Definition of "Major Security-based Swap Participant."

240.3a67 2—Categories of Security-based Swaps.

240.3a67 3—Definition of "Substantial Position."

240.3a67 4—Definition of "Hedging or Mitigating Commercial Risk."

240.3a67 5—Definition of "Substantial Counterparty Exposure."

240.3a67 6—Definitions of "Financial Entity" and "Highly Leveraged."

240.3a67 7—Timing Requirements, Reevaluation Period, and Termination of Status.

240.3a71 1—Definition of "Security-based Swap Dealer."

240.3a71 2—*De minimis* Exception.

* * * * *

§ 240.3a67-1 Definition of "Major Security-based Swap Participant."

(a) *General.* Major security-based swap participant means any person:

(1) That is not a security-based swap dealer; and

(2)(i) That maintains a substantial position in security-based swaps for any of the major security-based swap categories, excluding both positions held for hedging or mitigating commercial risk, and positions maintained by any employee benefit plan (or any contract held by such a plan) as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002) for the primary purpose of hedging or mitigating any risk directly associated with the operation of the plan;

(ii) Whose outstanding security-based swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets; or

(iii) That is a financial entity that:

(A) Is highly leveraged relative to the amount of capital such entity holds and that is not subject to capital requirements established by an appropriate Federal banking agency (as defined in 15 U.S.C. 78c(a)(72)); and

(B) Maintains a substantial position in outstanding security-based swaps in any major security-based swap category.

(b) *Scope of designation.* A person that is a major security-based swap participant in general shall be deemed to be a major security-based swap participant with respect to each security-based swap it enters into, regardless of the category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's designation as a major security-based swap participant to specified categories of security-based swaps or specified activities of the person in connection with security-based swaps.

§ 240.3a67-2 Categories of Security-based Swaps.

For purposes of sections 3(a)(67) and 3(a)(71) of the Act, 15 U.S.C. 78c(a)(67) and 78c(a)(71), and the rules thereunder, the terms *major security-based swap category*, *category of security-based swaps* and any similar terms mean either of the following categories of security-based swaps:

(a) *Security-based credit derivatives.* Any security-based swap that is based, in whole or in part, on one or more instruments of indebtedness (including loans), or on a credit event relating to one or more issuers or securities, including but not limited to any security-based swap that is a credit default swap, total return swap on one or more debt instruments, debt swap, debt index swap, or credit spread.

(b) *Other security-based swaps.* Any security-based swap not described in paragraph (a) of this section.

§ 240.3a67-3 Definition of "Substantial Position."

(a) *General.* For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67-1 of this chapter, the term *substantial position* means security-based swap positions, other than positions that are excluded from consideration, that equal or exceed either of the following thresholds in any major category of security-based swaps:

(1) \$1 billion in daily average aggregate uncollateralized outward exposure; or

(2) \$2 billion in:

(i) Daily average aggregate uncollateralized outward exposure; plus

(ii) Daily average aggregate potential outward exposure.

(b) *Aggregate uncollateralized outward exposure.* (1) *General.* *Aggregate uncollateralized outward exposure* in general means the sum of the current exposure, obtained by marking-to-market using industry standard practices, of each of the person's security-based swap positions with negative value in a major security-based swap category, less the value of the collateral the person has posted in connection with those positions.

(2) *Calculation of aggregate uncollateralized outward exposure.* In calculating this amount the person shall, with respect to each of its security-based swap counterparties in a given major security-based swap category:

(i) Determine the dollar value of the aggregate current exposure arising from each of its security-based swap positions with negative value (subject to the netting provisions described below) in that major category by marking-to-market using industry standard practices; and

(ii) Deduct from that dollar amount the aggregate value of the collateral the person has posted with respect to the security-based swap positions. The aggregate uncollateralized outward exposure shall be the sum of those uncollateralized amounts across all of the person's security-based swap counterparties in the applicable major category.

(3) *Relevance of netting agreements.*

(i) If a person has a master netting agreement with a counterparty, the person may measure the current exposure arising from its security-based swaps in any major category on a net basis, applying the terms of the agreement. Calculation of net exposure may take into account offsetting positions entered into with that

particular counterparty involving security-based swaps (in any swap category) as well as swaps and securities financing transactions (consisting of securities lending and borrowing, securities margin lending and repurchase and reverse repurchase agreements), to the extent these are consistent with the offsets permitted by the master netting agreement.

(ii) Such adjustments may not take into account any offset associated with positions that the person has with separate counterparties.

(c) *Aggregate potential outward exposure.* (1) *General.* *Aggregate potential outward exposure* means the sum of:

(i) The aggregate potential outward exposure for each of the person's security-based swap positions in a major security-based swap category that are not cleared by a registered clearing agency or subject to daily mark-to-market margining, as calculated in accordance with paragraph (c)(2) of this section; and

(ii) The aggregate potential outward exposure for each of the person's security-based swap positions in a major security-based swap category that are cleared by a registered clearing agency or subject to daily mark-to-market margining, as calculated in accordance with paragraph (c)(3) of this section.

(2) Calculation of potential outward exposure for security-based swaps that are not cleared by a registered clearing agency or subject to daily mark-to-market margining.

(i) *General.* (A)(1) For positions in security-based swaps that are not cleared by a registered clearing agency or subject to daily mark-to-market margining, potential outward exposure equals the total notional principal amount of those positions, multiplied by the following factors on a position-by-position basis reflecting the type of security-based swap. For any security-based swap that is not of the "credit" or "equity" type, the "other" conversion factors are to be used:

Residual maturity	Credit	Equity	Other
One year or less	0.10	0.06	0.10
Over one to five years	0.10	0.08	0.12
Over five years	0.10	0.10	0.15

(2) If a security-based swap is structured such that on specified dates any outstanding exposure is settled and the terms are reset so that the market value of the security-based swap is zero,

the remaining maturity equals the time until the next reset date.

(B) *Use of effective notional amounts.* If the stated notional amount on a position is leveraged or enhanced by the structure of the position, the calculation

in paragraph (c)(2)(i)(A) of this section shall be based on the effective notional amount of the position rather than on the stated notional amount.

(C) *Exclusion of certain positions.* The calculation in paragraph (c)(2)(i)(A) of this section shall exclude:

(1) Positions that constitute the purchase of an option, such that the person has no additional payment obligations under the position; and

(2) Other positions for which the person has prepaid or otherwise satisfied all of its payment obligations.

(D) *Adjustment for certain positions.* Notwithstanding paragraph (c)(2)(i)(A) of this section, the potential outward exposure associated with a position by which a person buys credit protection using a credit default swap is capped at the net present value of the unpaid premiums.

(ii) *Adjustment for netting agreements.* Notwithstanding paragraph (c)(2)(i) of this section, for positions subject to master netting agreements the potential outward exposure associated with the person's security-based swaps with each counterparty equals a weighted average of the potential outward exposure for the person's security-based swaps with that counterparty as calculated under paragraph (c)(2)(i) of this section, and that amount reduced by the ratio of net current exposure to gross current exposure, consistent with the following equation as calculated on a counterparty-by-counterparty basis:

$$P_{Net} = 0.4 \times P_{Gross} + 0.6 \times NGR \times P_{Gross}$$

Note to paragraph (c)(2)(ii). Where: P_{Net} is the potential outward exposure, adjusted for bilateral netting, of the person's security-based swaps with a particular counterparty; P_{Gross} is that potential outward exposure without adjustment for bilateral netting; and NGR is the ratio of net current exposure to gross current exposure.

(3) Calculation of potential outward exposure for security-based swaps that are cleared by a registered clearing agency or subject to daily mark-to-market margining. For positions in security-based swaps that are cleared by a registered clearing agency or subject to daily mark-to-market margining:

(i) Potential outward exposure equals the potential outward exposure that would be attributed to such positions using the procedures in paragraph (c)(2) of this section, multiplied by 0.2.

(ii) For purposes of this calculation, a security-based swap shall be considered to be subject to daily mark-to-market margining if, and for as long as, the counterparties follow the daily practice of exchanging collateral to reflect changes in the current exposure arising from the security-based swap (after taking into account any other financial positions addressed by a netting agreement between the counterparties).

If the person is permitted by agreement to maintain a threshold for which it is not required to post collateral, the total amount of that threshold (regardless of the actual exposure at any time) shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (a)(2) of this section. If the minimum transfer amount under the agreement is in excess of \$1 million, the entirety of the minimum transfer amount shall be added to the person's aggregate uncollateralized outward exposure for purposes of paragraph (a)(2) of this section.

(d) *Calculation of daily average.* Measures of daily average aggregate uncollateralized outward exposure and daily average aggregate potential outward exposure shall equal the arithmetic mean of the applicable measure of exposure at the close of each business day, beginning the first business day of each calendar quarter and continuing through the last business day of that quarter.

§ 240.3a67-4 Definition of "Hedging or Mitigating Commercial Risk."

For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67-1 of this chapter, a security-based swap position shall be deemed to be held for the purpose of hedging or mitigating commercial risk when:

(a) Such position is economically appropriate to the reduction of risks that are associated with the present conduct and management of a commercial enterprise, or are reasonably expected to arise in the future conduct and management of the commercial enterprise, where such risks arise from:

(1) The potential change in the value of assets that a person owns, produces, manufactures, processes, or merchandises or reasonably anticipates owning, producing, manufacturing, processing, or merchandising in the ordinary course of business of the enterprise;

(2) The potential change in the value of liabilities that a person has incurred or reasonably anticipates incurring in the ordinary course of business of the enterprise; or

(3) The potential change in the value of services that a person provides, purchases, or reasonably anticipates providing or purchasing in the ordinary course of business of the enterprise;

(b) Such position is:

(1) Not held for a purpose that is in the nature of speculation or trading; and

(2) Not held to hedge or mitigate the risk of another security-based swap position or swap position, unless that other position itself is held for the purpose of hedging or mitigating

commercial risk as defined by this section or 17 CFR 1.3(ttt); and

(c) The person holding the position satisfies the following additional conditions:

(1) The person identifies and documents the risks that are being reduced by the security-based swap position;

(2) The person establishes and documents a method of assessing the effectiveness of the security-based swap as a hedge; and

(3) The person regularly assesses the effectiveness of the security-based swap as a hedge.

§ 240.3a67-5 Definition of "Substantial Counterparty Exposure."

(a) *General.* For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67-1 of this chapter, the term *substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets* means a security-based swap position that satisfies either of the following thresholds:

(1) \$2 billion in daily average aggregate uncollateralized outward exposure; or

(2) \$4 billion in:
(i) Daily average aggregate uncollateralized outward exposure; plus
(ii) Daily average aggregate potential outward exposure.

(b) *Calculation.* For these purposes, daily average *aggregate uncollateralized outward exposure* and daily average *aggregate potential outward exposure* shall be calculated the same way as is prescribed in § 240.3a67-3 of this chapter, except that these amounts shall be calculated by reference to all of the person's security-based swap positions, rather than by reference to a specific major security-based swap category.

§ 240.3a67-6 Definitions of "Financial Entity" and "Highly Leveraged."

(a) For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67-1 of this chapter, the term *financial entity* means:

(1) A swap dealer;
(2) A major swap participant;
(3) A commodity pool as defined in section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10));
(4) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a));

(5) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); and

(6) A person predominantly engaged in activities that are in the business of banking or financial in nature, as defined in section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843k).

(b) For purposes of section 3(a)(67) of the Act, 15 U.S.C. 78c(a)(67), and § 240.3a67-1 of this chapter, the term *highly leveraged* means the existence of a ratio of an entity's total liabilities to equity in excess of [8 to 1 or 15 to 1] as measured at the close of business on the last business day of the applicable fiscal quarter. For this purpose, liabilities and equity should each be determined in accordance with U.S. generally accepted accounting principles.

§ 240.3a67-7 Timing Requirements, Reevaluation Period, and Termination of Status.

(a) *Timing requirements.* A person that is not registered as a major security-based swap participant, but that meets the criteria in § 240.3a67-1 of this chapter to be a major security-based swap participant as a result of its security-based swap activities in a fiscal quarter, will not be deemed to be a major security-based swap participant until the earlier of the date on which it submits a complete application for registration pursuant to 15 U.S.C. 78o-8 or two months after the end of that quarter.

(b) *Reevaluation period.* Notwithstanding paragraph (a) of this section, if a person that is not registered as a major security-based swap participant meets the criteria in § 240.3a67-1 of this chapter to be a major security-based swap participant in a fiscal quarter, but does not exceed any applicable threshold by more than twenty percent in that quarter:

(1) That person will not immediately be subject to the timing requirements specified in paragraph (a) of this section; but

(2) That person will become subject to the timing requirements specified in paragraph (a) of this section at the end of the next fiscal quarter if the person exceeds any of the applicable daily average thresholds in that next fiscal quarter.

(c) *Termination of status.* A person that is deemed to be a major security-based swap participant shall continue to be deemed a major security-based swap participant until such time that its security-based swap activities do not exceed any of the daily average thresholds set forth within § 240.3a67-1 of this chapter for four consecutive

fiscal quarters after the date on which the person becomes registered as a major security-based swap participant.

§ 240.3a71-1 Definition of "Security-based Swap Dealer."

(a) *General.* The term *security-based swap dealer* in general means any person who:

(1) Holds itself out as a dealer in security-based swaps;

(2) Makes a market in security-based swaps;

(3) Regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(4) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(b) *Exception.* The term *security-based swap dealer* does not include a person that enters into security-based swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(c) *Scope of designation.* A person that is a security-based swap dealer in general shall be deemed to be a security-based swap dealer with respect to each security-based swap it enters into, regardless of the category of the security-based swap or the person's activities in connection with the security-based swap, unless the Commission limits the person's designation as a major security-based swap participant to specified categories of security-based swaps or specified activities of the person in connection with security-based swaps.

§ 240.3a71-2 De minimis Exception.

For purposes of section 3(a)(71) of the Act, 15 U.S.C. 78c(a)(71), and § 240.3a71-1 of this chapter, a person shall not be deemed to be a security-based swap dealer as a result of security-based swap dealing activity involving counterparties that meets each of the following conditions:

(a) *Notional amount of outstanding security-based swap positions.* The security-based swap positions connected with those activities into which the person enters over the course of the immediately preceding 12 months have an aggregate gross notional amount of no more than \$100 million and have an aggregate gross notional amount of no more than \$25 million with regard to security-based swaps in which the counterparty is a "special entity" (as that term is defined in 15 U.S.C. 78o-8). For purposes of this paragraph (a), if the

stated notional amount of a security-based swap is leveraged or enhanced by the structure of the security-based swap, the calculation shall be based on the effective notional amount of the security-based swap rather than on the stated notional amount.

(b) *No more than 15 counterparties.* The person does not enter into security-based swaps in connection with those activities with more than 15 counterparties, other than security-based swap dealers, over the course of the immediately preceding 12 months. In determining the number of counterparties, all counterparties that are members of a single affiliated group shall be considered to be a single counterparty.

(c) *No more than 20 security-based swaps.* The person has not entered into more than 20 security-based swaps in connection with those activities over the course of the immediately preceding 12 months. For purposes of this paragraph, each transaction entered into under a master agreement for security-based swaps shall constitute a distinct security-based swap, but entering into an amendment of an existing security-based swap in which the counterparty to such swap remains the same and the notional item underlying such security-based swap remains substantially the same shall not constitute entering into a security-based swap.

Dated: December 1, 2010.

By the Commodity Futures Trading Commission.

David A. Stawick,
Secretary.

Dated: December 7, 2010.

By the Securities and Exchange Commission.

Elizabeth M. Murphy,
Secretary.

Additional Statement by the Commodity Futures Trading Commission Regarding the Joint Proposed Rule Entitled "Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant,' and 'Eligible Contract Participant.'"

On this matter, Chairman Gensler and Commissioners Dunn and Chilton voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

[FR Doc. 2010-31130 Filed 12-20-10; 8:45 am]

BILLING CODE 6351-01-P; 8011-01-P



Federal Register

**Tuesday,
December 21, 2010**

Part IV

Environmental Protection Agency

40 CFR Part 63

**National Emission Standards for
Shipbuilding and Ship Repair (Surface
Coating); National Emission Standards for
Wood Furniture Manufacturing
Operations; Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 63**

[EPA-HQ-OAR-2010-0786; FRL-9237-1]

RIN 2060-AQ42

National Emission Standards for Shipbuilding and Ship Repair (Surface Coating); National Emission Standards for Wood Furniture Manufacturing Operations**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Proposed rule.

SUMMARY: This action proposes how EPA will address the residual risk and technology review conducted for two industrial source categories regulated by separate national emission standards for hazardous air pollutants. It also proposes to address provisions related to emissions during periods of startup, shutdown, and malfunction.

DATES: *Comments.* Comments must be received on or before February 22, 2011. Under the Paperwork Reduction Act, comments on the information collection provisions are best assured of having full effect if the Office of Management and Budget receives a copy of your comments on or before January 20, 2011.

Public Hearing. If anyone contacts EPA requesting to speak at a public hearing by January 5, 2011, a public hearing will be held on January 20, 2011.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA-HQ-OAR-2010-0786, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

- *E-mail:* a-and-r-docket@epa.gov, Attention Docket ID Number EPA-HQ-OAR-2010-0786.

- *Facsimile:* (202) 566-9744. Attention Docket ID Number EPA-HQ-OAR-2010-0786.

- *Mail:* U.S. Postal Service, send comments to: EPA Docket Center, EPA West (Air Docket), Attention Docket ID Number EPA-HQ-OAR-2010-0786, U.S. Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Please include a total of two copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of

Management and Budget, *Attn:* Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), Room 3334, 1301 Constitution Ave., NW., Washington, DC 20004. Attention Docket ID Number EPA-HQ-OAR-2010-0786. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID Number EPA-HQ-OAR-2010-0786. EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential business information or other information whose disclosure is restricted by statute. Do not submit information that you consider to be confidential business information or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail

address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket. The EPA has established a docket for this rulemaking under Docket ID Number EPA-HQ-OAR-2010-0786. All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., confidential business information

or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the EPA Docket Center is (202) 566-1742.

Public Hearing. If a public hearing is held, it will begin at 10 a.m. on January 20, 2011 and will be held at EPA's campus in Research Triangle Park, North Carolina, or at an alternate facility nearby. For information on the status of the public hearing, go to <http://www.epa.gov/ttn/atw/rrisk/rtrpg.html>. Persons interested in presenting oral testimony or inquiring as to whether a public hearing is to be held should contact Ms. Joan Rogers, Office of Air Quality Planning and Standards, Sector Policies and Programs Division, Natural Resources and Commerce Group (E143-01), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; *telephone number:* (919) 541-4487.

FOR FURTHER INFORMATION CONTACT: For questions about this proposed action, contact Ms. J. Kaye Whitfield, Sector Policies and Programs Division (E143-01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-2509; *facsimile number:* (919) 541-3470; and *e-mail address:* whitfield.kaye@epa.gov. For specific information regarding the risk modeling methodology, contact Ms. Elaine Manning, Health and Environmental Impacts Division (C539-02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; *telephone number:* (919) 541-5499; *facsimile number:* (919) 541-0840; and *e-mail address:* manning.elaine@epa.gov.

For information about the applicability of these two National Emissions Standards for Hazardous Air Pollutants to a particular entity, contact the appropriate person listed in Table 1 to this preamble.

TABLE 1—LIST OF EPA CONTACTS FOR THE NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS (NESHAP) ADDRESSED IN THIS PROPOSED ACTION

NESHAP for:	OECA Contact ¹	OAQPS Contact ²
Shipbuilding and Ship Repair (Surface Coating)	Mr. Leonard Lazarus, (202) 564–6369, lazarus.leonard@epa.gov .	Ms. J. Kaye Whitfield, (919) 541–2509, whitfield.kaye@epa.gov
Wood Furniture Manufacturing Operations	Mr. Leonard Lazarus, (202) 564–6369, lazarus.leonard@epa.gov .	Ms. J. Kaye Whitfield, (919) 541–2509, whitfield.kaye@epa.gov

¹ OECA stands for EPA's Office of Enforcement and Compliance Assurance.

² OAQPS stands for EPA's Office of Air Quality Planning and Standards.

SUPPLEMENTARY INFORMATION:

I. Preamble Acronyms and Abbreviations

Several acronyms and terms used to describe industrial processes, data inventories, and risk modeling are included in this preamble. While this may not be an exhaustive list, to ease the reading of this preamble and for reference purposes, the following terms and acronyms are defined here:

ACA American Coatings Association
ACGIH American Conference of Governmental Industrial Hygienists
ADAF Age-dependent Adjustment Factors
AEGL Acute Exposure Guideline Levels
AERMOD The air dispersion model used by the HEM-3 model
AHFA American Home Furnishings Alliance
ANPRM Advance Notice of Proposed Rulemaking
APA Administrative Procedure Act
ATSDR Agency for Toxic Substances and Disease Registry
BACT Best Available Control Technology
BIFMA Business and Institutional Furniture Manufacturer's Association
CalEPA California Environmental Protection Agency
CAA Clean Air Act
CBI Confidential Business Information
CEEL Community Emergency Exposure Levels
CEMS Continuous Emissions Monitoring System
CFR Code of Federal Regulations
CIIT Chemical Industry Institute of Toxicology
DGBE Diethylene Glycol Monobutyl Ether
EGME Ethylene Glycol Monomethyl Ether
EJ Environmental Justice
EPA Environmental Protection Agency
ERPG Emergency Response Planning Guidelines
HAP Hazardous Air Pollutants
HI Hazard Index
HEM-3 Human Exposure Model version 3
HON Hazardous Organic National Emissions Standards for Hazardous Air Pollutants
HQ Hazard Quotient
ICR Information Collection Request
IRIS Integrated Risk Information System
KCMA Kitchen Cabinet Manufacturing Association
Kg Kilogram
Km Kilometer
LAER Lowest Achievable Emission Rate

MACT Maximum Achievable Control Technology
MACT Code Code within the NEI used to identify processes included in a source category
MIR Maximum Individual Risk
MRL Minimum Risk Level
NAC/AEGL Committee National Advisory Committee for Acute Exposure Guideline Levels for Hazardous Substances
NAICS North American Industry Classification System
NAS National Academy of Sciences
NATA National Air Toxics Assessment
NESHAP National Emissions Standards for Hazardous Air Pollutants
NEI National Emissions Inventory
NIOSH National Institutes for Occupational Safety and Health
NOAEL No Observed Adverse Effects Level
NO_x Nitrous Oxide
NRC National Research Council
NTTAA National Technology Transfer and Advancement Act
OAQPS EPA's Office of Air Quality Planning and Standards
OECA EPA's Office of Enforcement and Compliance Assurance
OMB Office of Management and Budget
PB-HAP Hazardous air pollutants known to be persistent and bio-accumulative in the environment
POM Polycyclic Organic Matter
PPRTV Provisional Peer Reviewed Toxicity Value
PRA Paperwork Reduction Act
RACT Reasonably Available Control Technology
RBLC RACT/BACT/LAER Clearinghouse
REL CalEPA Reference Exposure Level
RFA Regulatory Flexibility Act
RFC Reference Concentration
RfD Reference Dose
RTO Regenerative Thermal Oxidizer
RTR Residual Risk and Technology Review
SAB Science Advisory Board
SBA Small Business Administration
SCC Source Classification Codes
SF3 2000 Census of Population and Housing Summary File 3
SOP Standard Operating Procedures
SSM Startup, Shutdown, and Malfunction
TOSHI Target Organ-Specific Hazard Index
TPY Tons Per Year
TRIM Total Risk Integrated Modeling System
TRIM.FaTE A spatially explicit, compartmental mass balance model that describes the movement and transformation of pollutants over time, through a user-defined, bounded system that includes both biotic and abiotic compartments

TTN Technology Transfer Network
UF Uncertainty Factor
UMRA Unfunded Mandates Reform Act
URE Unit Risk Estimate
VCS Voluntary Consensus Standards
VHAP Volatile Hazardous Air Pollutants
VOC Volatile Organic Compounds
VOHAP Volatile Organic Hazardous Air Pollutants
WWW Worldwide Web

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

- I. Preamble Acronyms and Abbreviations
- II. General Information
 - A. Does this action apply to me?
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- IX. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review
 - B. Paperwork Reduction Act
 - C. Regulatory Flexibility Act
 - D. Unfunded Mandates Reform Act
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

II. General Information

A. Does this action apply to me?

The regulated industrial source categories that are the subject of this proposal are listed in Table 2 of this preamble. Table 2 is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by the proposed action for the

source categories listed. These standards, and any changes considered in this rulemaking, would be directly applicable to sources as a federal program. Thus, federal, state, local, and tribal government entities are not affected by this proposed action. The regulated categories affected by this proposed action are shown in Table 2.

TABLE 2—NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

NESHAP and source category	NAICS code ¹	MACT code ²
Shipbuilding and Ship Repair (Surface Coating)	336611	0715–2
Wood Furniture Manufacturing Operations	3371, 3372, 3379	0716

¹ North American Industry Classification System.

² Maximum Achievable Control Technology.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the WWW through the EPA's TTN. Following signature by the EPA Administrator, a copy of this proposed action will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at the following address: <http://www.epa.gov/ttn/atw/risk/rtrpg.html>. The TTN provides information and technology exchange in various areas of air pollution control.

Additional information is available on the RTR web page at <http://www.epa.gov/ttn/atw/risk/rtrpg.html>. This information includes the most recent version of the rule, source category descriptions, detailed emissions, and other data that were used as inputs to the risk assessments.

C. What should I consider as I prepare my comments for EPA?

Submitting CBI. Do not submit information containing CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. If you submit a CD ROM or disk that does not contain CBI, mark the outside of the disk or CD ROM clearly that it does not

contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID Number EPA–HQ–OAR–2010–0786.

III. Background

A. What is the statutory authority for this action?

Section 112 of the CAA establishes a two-stage regulatory process to address emissions of HAP from stationary sources. In the first stage, after EPA has identified categories of sources emitting one or more of the HAP listed in section 112(b) of the CAA, section 112(d) of the CAA calls for us to promulgate NESHAP for those sources. "Major sources" are those that emit or have the potential to emit 10 TPY or more of a single HAP or 25 TPY or more of any combination of HAP. For major sources, these technology-based standards must reflect the maximum degree of emission reductions of HAP achievable (after considering cost, energy requirements, and nonair quality health and environmental impacts) and are commonly referred to as MACT standards.

MACT standards must reflect application of measures, processes, methods, systems, or techniques, including, but not limited to, measures which, (A) Reduce the volume of or eliminate pollutants through process changes, substitution of materials or

other modifications; (B) enclose systems or processes to eliminate emissions; (C) capture or treat pollutants when released from a process, stack, storage, or fugitive emissions point; (D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification); or (E) are a combination of the above. CAA section 112(d)(2)(A)–(E). The MACT standards may take the form of design, equipment, work practice, or operational standards where EPA first determines either that, (A) a pollutant cannot be emitted through a conveyance designed and constructed to emit or capture the pollutants, or that any requirement for, or use of, such a conveyance would be inconsistent with law; or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological and economic limitations. CAA sections 112(h)(1)–(2).

The MACT "floor" is the minimum control level allowed for MACT standards promulgated under CAA section 112(d)(3) and may not be based on cost considerations. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT floors for existing sources can be less stringent than floors for new sources, but they cannot be less stringent than the average emissions limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing five sources for categories or subcategories with fewer than 30 sources). In developing MACT standards, we must also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor

based on the consideration of the cost of achieving the emissions reductions, any nonair quality health and environmental impacts, and energy requirements.

The EPA is required to review these technology-based standards and to revise them “as necessary (taking into account developments in practices, processes, and control technologies)” no less frequently than every 8 years, under CAA section 112(d)(6). In conducting this review, EPA is not obliged to completely recalculate the prior MACT determination. *NRDC v. EPA*, 529 F.3d 1077, 1084 (DC Cir. 2008).

The second stage in standard-setting focuses on reducing any remaining “residual” risk according to CAA section 112(f). This provision requires, first, that EPA prepare a *Report to Congress* discussing (among other things) methods of calculating the risks posed (or potentially posed) by sources after implementation of the MACT standards, the public health significance of those risks, the means and costs of controlling them, the actual health effects to persons in proximity of emitting sources, and the recommendations regarding legislation of such remaining risk. EPA prepared and submitted this report (*Residual Risk Report to Congress*, EPA-453/R-99-001) in March 1999. Congress did not act in response to the report, thereby triggering EPA’s obligation under CAA section 112(f)(2) to analyze and address residual risk.

Section 112(f)(2) of the CAA requires us to determine, for source categories subject to certain MACT standards, whether the emissions standards provide an ample margin of safety to protect public health. If the MACT standards for HAP “classified as a known, probable, or possible human carcinogen, do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than 1-in-1 million,” EPA must promulgate residual risk standards for the source category (or subcategory) as necessary to provide an ample margin of safety to protect public health. In doing so, EPA may adopt standards equal to existing MACT standards if EPA determines that the existing standards are sufficiently protective. As stated in *NRDC v. EPA*, 529 F.3d 1077, 1083 (DC Cir. 2008), “If EPA determines that the existing technology-based standards provide an ‘ample margin of safety,’ then the Agency is free to readopt those standards during the residual risk rulemaking.” CAA section 112(f)(2) further states that EPA must also adopt more stringent standards if required, “to prevent, taking into consideration costs, energy, safety, and other relevant

factors, an adverse environmental effect.”¹

When Section 112(f)(2) of the CAA was enacted in 1990, it expressly preserved our use of the two-step process for developing standards to address any residual risk and our interpretation of “ample margin of safety” developed in the *National Emission Standards for Hazardous Air Pollutants: Benzene Emissions from Maleic Anhydride Plants, Ethylbenzene/Styrene Plants, Benzene Storage Vessels, Benzene Equipment Leaks, and Coke By-Product Recovery Plants* (Benzene NESHAP) (54 FR 38044, September 14, 1989). The first step in this process is the determination of acceptable risk. The second step provides for an ample margin of safety to protect public health, which is the level at which the standards are set (unless a more stringent standard is required to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect).

The terms “individual most exposed,” “acceptable level,” and “ample margin of safety” are not specifically defined in the CAA. However, CAA section 112(f)(2)(B) preserves the interpretation set out in the Benzene NESHAP, and the Court (in *NRDC v. EPA*) concluded that EPA’s interpretation of subsection 112(f)(2) is a reasonable one. See *NRDC v. EPA*, 529 F.3d 1077, 1083 (DC Cir. 2008), which says “[S]ubsection 112(f)(2)(B) expressly incorporates EPA’s interpretation of the Clean Air Act from the Benzene standard, complete with a citation to the **Federal Register**.” See also, *A Legislative History of the Clean Air Act Amendments of 1990*, volume 1, p. 877 (Senate debate on Conference Report). We notified Congress in the *Residual Risk Report to Congress* that we intended to use the Benzene NESHAP approach in making CAA section 112(f) residual risk determinations (EPA-453/R-99-001, p. ES-11).

In the Benzene NESHAP, we stated as an overall objective:

* * * in protecting public health with an ample margin of safety, we strive to provide maximum feasible protection against risks to health from hazardous air pollutants by (1) protecting the greatest number of persons possible to an individual lifetime risk level no higher than approximately 1-in-1 million;

¹ “Adverse environmental effect” is defined in CAA section 112(a)(7) as any significant and widespread adverse effect, which may be reasonably anticipated to wildlife, aquatic life, or natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental qualities over broad areas.

and (2) limiting to no higher than approximately 1-in-10 thousand [i.e., 100-in-1 million] the estimated risk that a person living near a facility would have if he or she were exposed to the maximum pollutant concentrations for 70 years.

The EPA also stated that, “The EPA also considers incidence (the number of persons estimated to suffer cancer or other serious health effects as a result of exposure to a pollutant) to be an important measure of the health risk to the exposed population. Incidence measures the extent of health risk to the exposed population as a whole, by providing an estimate of the occurrence of cancer or other serious health effects in the exposed population.” The EPA went on to conclude, “estimated incidence would be weighed along with other health risk information in judging acceptability.” As explained more fully in our *Residual Risk Report to Congress*, EPA does not define “rigid line[s] of acceptability,” but considers rather broad objectives to be weighed with a series of other health measures and factors (EPA-453/R-99-001, p. ES-11). The determination of what represents an “acceptable” risk is based on a judgment of “what risks are acceptable in the world in which we live” (*Residual Risk Report to Congress*, p. 178, quoting the Vinyl Chloride decision at 824 F.2d 1165) recognizing that our world is not risk-free.

In the Benzene NESHAP, we stated that “EPA will generally presume that if the risk to [the maximum exposed] individual is no higher than approximately 1-in-10 thousand, that risk level is considered acceptable.” 54 FR 38045. We discussed the maximum individual lifetime cancer risk as being “the estimated risk that a person living near a plant would have if he or she were exposed to the maximum pollutant concentrations for 70 years.” *Id.* We explained that this measure of risk “is an estimate of the upper bound of risk based on conservative assumptions, such as continuous exposure for 24 hours per day for 70 years.” *Id.* We acknowledge that maximum individual lifetime cancer risk “does not necessarily reflect the true risk, but displays a conservative risk level which is an upper-bound that is unlikely to be exceeded.” *Id.*

Understanding that there are both benefits and limitations to using maximum individual lifetime cancer risk as a metric for determining acceptability, we acknowledged in the 1989 Benzene NESHAP that “consideration of maximum individual risk * * * must take into account the strengths and weaknesses of this measure of risk.” *Id.* Consequently, the

presumptive risk level of 100-in-1 million (1-in-10 thousand) provides a benchmark for judging the acceptability of maximum individual lifetime cancer risk, but does not constitute a rigid line for making that determination.

The EPA also explained in the 1989 Benzene NESHAP the following: “In establishing a presumption for MIR [maximum individual cancer risk], rather than a rigid line for acceptability, the Agency intends to weigh it with a series of other health measures and factors. These include the overall incidence of cancer or other serious health effects within the exposed population, the numbers of persons exposed within each individual lifetime risk range and associated incidence within, typically, a 50-km exposure radius around facilities, the science policy assumptions and estimation uncertainties associated with the risk measures, weight of the scientific evidence for human health effects, other quantified or unquantified health effects, effects due to co-location of facilities, and co-emission of pollutants.” *Id.*

In some cases, these health measures and factors taken together may provide a more realistic description of the magnitude of risk in the exposed population than that provided by maximum individual lifetime cancer risk alone. As explained in the Benzene NESHAP, “[e]ven though the risks judged “acceptable” by EPA in the first step of the Vinyl Chloride inquiry are already low, the second step of the inquiry, determining an “ample margin of safety,” again includes consideration of all of the health factors, and whether to reduce the risks even further.” In the ample margin of safety decision process, the EPA again considers all of the health risks and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including costs and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors. Considering all of these factors, the EPA will establish the standard at a level that provides an ample margin of safety to protect the public health, as required by CAA section 112(f). 54 FR 38046.

B. How did we consider the risk results in making decisions for this proposal?

As discussed in section III.A of this preamble, we apply a two-step process for developing standards to address residual risk. In the first step, EPA determines if risks are acceptable. This determination “considers all health information, including risk estimation

uncertainty, and includes a presumptive limit on MIR² of approximately 1-in-10 thousand [i.e., 100-in-1 million].” 54 FR 38045. In the second step of the process, EPA sets the standard at a level that provides an ample margin of safety “in consideration of all health information, including the number of persons at risk levels higher than approximately 1-in-1 million, as well as other relevant factors, including costs and economic impacts, technological feasibility, and other factors relevant to each particular decision.” *Id.*

In past residual risk determinations, EPA presented a number of human health risk metrics associated with emissions from the category under review, including: The MIR; the numbers of persons in various risk ranges; cancer incidence; the maximum non-cancer HI; and the maximum acute non-cancer hazard (72 FR 25138, May 3, 2007; 71 FR 42724, July 27, 2006). EPA also discussed and considered risk estimation uncertainties. In our most recent proposal (75 FR 65068), EPA also presented and considered additional measures of health information to support our decision-making, including: Estimates of “total facility” risks (risks from all HAP emissions from the facility at which the source category is located);³ demographic analyses (analyses of the distributions of HAP-related risks across different social, demographic, and economic groups living near the facilities); and estimates of the risks associated with emissions allowed by the MACT standards (75 FR 65068, October 21, 2010). EPA is providing this same type of information in support of the proposed actions described in this **Federal Register** notice.

The EPA is considering all available health information to inform our determinations of risk acceptability and ample margin of safety under CAA section 112(f). Specifically, as explained in the Benzene NESHAP, “the first step judgment on acceptability cannot be reduced to any single factor” and thus “[t]he Administrator believes that the acceptability of risk under section 112 is best judged on the basis of a broad set of health risk measures and information.” 54 FR 38044, 38046 (Sept. 14, 1989). Similarly, with regard to making the ample margin of safety determination, as stated in the Benzene

NESHAP “[I]n the ample margin decision, the EPA again considers all of the health risk and other health information considered in the first step. Beyond that information, additional factors relating to the appropriate level of control will also be considered, including cost and economic impacts of controls, technological feasibility, uncertainties, and any other relevant factors.” *Id.*

The EPA acknowledges that flexibility is provided by the Benzene NESHAP regarding what factors EPA might consider in making determinations and how they might be weighed for each source category. In responding to comment on our policy under the Benzene NESHAP, EPA explained that: “The policy chosen by the Administrator permits consideration of multiple measures of health risk. Not only can the MIR figure be considered, but also incidence, the presence of non-cancer health effects, and the uncertainties of the risk estimates. In this way, the effect on the most exposed individuals can be reviewed as well as the impact on the general public. These factors can then be weighed in each individual case. This approach complies with the Vinyl Chloride mandate that the Administrator ascertain an acceptable level of risk to the public by employing [her] expertise to assess available data. It also complies with the Congressional intent behind the CAA, which did not exclude the use of any particular measure of public health risk from the EPA’s consideration with respect to CAA section 112 regulations, and, thereby, implicitly permits consideration of any and all measures of health risk which the Administrator, in [her] judgment, believes are appropriate to determining what will ‘protect the public health.’” 54 FR 38057.

For example, the level of the MIR is only one factor to be weighed in determining acceptability of risks. It is explained in the Benzene NESHAP “an MIR of approximately 1-in-10 thousand should ordinarily be the upper end of the range of acceptability. As risks increase above this benchmark, they become presumptively less acceptable under CAA section 112, and would be weighed with the other health risk measures and information in making an overall judgment on acceptability. Or, the EPA may find, in a particular case, that a risk that includes MIR less than the presumptively acceptable level is unacceptable in the light of other health risk factors.” *Id.* at 38045. Similarly, with regard to the ample margin of safety analysis, it is stated in the Benzene NESHAP that: “* * * EPA believes the relative weight of the many

² Although defined as “maximum individual risk,” MIR refers only to cancer risk. MIR, one metric for assessing cancer risk, is the estimated risk were an individual exposed to the maximum level of a pollutant for a lifetime.

³ EPA previously provided estimates of total facility risk in a residual risk proposal for coke oven batteries (69 FR 48338, August 9, 2004).

factors that can be considered in selecting an ample margin of safety can only be determined for each specific source category. This occurs mainly because technological and economic factors (along with the health-related factors) vary from source category to source category.” *Id.* at 38061.

EPA wishes to point out that certain health information has not been considered in these decisions. In assessing risks to populations in the vicinity of the facilities in each category, we present estimates of risk associated with HAP emissions from the source category alone (source category risk estimates) and HAP emissions from the entire facilities at which the covered source categories are located (facility-wide risk estimates). We do not attempt to characterize the risks associated with all HAP emissions impacting the populations living near the sources in these categories. That is, we have not presented estimates of total HAP inhalation risks from all sources in the vicinity of the covered sources (e.g., the sum of the risks from ambient levels, emissions from the source category, facility-wide emissions, and emissions from other facilities nearby), nor have we attempted to include estimates of total HAP inhalation risks from indoor sources such as from cooking or degassing from consumer products.

The EPA understands the potential importance of considering an individual’s total exposure to HAP in addition to considering exposure to HAP emissions from the source category and facility. While such considerations are relevant to both cancer and non-cancer risk assessments, they can be particularly important when assessing cumulative non-cancer risks, where pollutant-specific risk-based exposure levels (e.g., RFC) are based on the assumption that thresholds exist for adverse health effects. For example, the EPA recognizes that, although exposures attributable to emissions from a source category or facility alone may not indicate the potential for increased risk of adverse non-cancer health effects in a population, the exposures resulting from emissions from the facility in combination with emissions from all of the other sources (e.g., other facilities) to which an individual is exposed, may be sufficient to result in increased risk of adverse non-cancer health effects. In May 2010, the SAB advised us “* * * that RTR assessments will be most useful to decision makers and communities if results are presented in the broader context of aggregate and cumulative risks, including background

concentrations and contributions from other sources in the area.”⁴

While we are interested in placing source category and facility-wide HAP risks in the context of total HAP risks from all sources combined in the vicinity of each source, we are concerned about the uncertainties of doing so. At this point, we believe that such estimates of total HAP risks will have significantly greater associated uncertainties than for the source category or facility-wide estimates, hence compounding the uncertainty in any such comparison. This is because we have not conducted a detailed technical review of HAP emissions data for source categories and facilities that have not previously undergone a RTR review or are not currently undergoing such review. We are requesting comment on whether and how best to estimate and evaluate total HAP exposure from outdoor sources in our assessments, and, in particular, on whether and how it might be appropriate to use information from EPA’s NATA to support such estimates. We also request comment whether and how to estimate total HAP exposure from indoor sources in the context of these assessments. We are also seeking comment on how best to consider various types and scales of risk estimates when making our acceptability and ample margin of safety determinations under CAA section 112(f). Additionally, we are seeking comments and recommendations for any other comparative measures that may be useful in the assessment of the distribution of HAP risks across potentially affected demographic groups.

C. What other actions are we addressing in this proposal?

We are also proposing to revise requirements in these MACT standards related to emissions during periods of SSM. The United States Court of Appeals for the District of Columbia Circuit vacated portions of two provisions in EPA’s CAA section 112 regulations governing the emissions of HAP during periods of SSM. *Sierra Club v. EPA*, 551 F.3d 1019 (DC Cir. 2008), *cert. denied*, 130 S. Ct. 1735 (U.S. 2010). Specifically, the Court vacated the SSM exemption contained in 40 CFR

63.6(f)(1) and 40 CFR 63.6(h)(1), that are part of a regulation, commonly referred to as the *General Provisions Rule*, that EPA promulgated under section 112 of the CAA. When incorporated into CAA section 112(d) regulations for specific source categories, these two provisions exempt sources from the requirement to comply with the otherwise applicable CAA section 112(d) emission standard during periods of SSM.

We are proposing the elimination of the SSM exemption in both of the MACT standards addressed in this proposal. Consistent with *Sierra Club v. EPA*, EPA is proposing standards in these rules that apply at all times. In proposing the standards in these rules, EPA has taken into account startup and shutdown periods, and, because operations and emissions do not differ from normal operations during these periods, has not proposed different standards for these periods. We are also proposing several revisions to the *General Provisions Applicability* table in both of the MACT standards. For example, we are proposing to eliminate the incorporation of the *General Provisions’* requirement that the source develop a SSM plan. We are also proposing to eliminate or revise certain recordkeeping and reporting requirements related to the SSM exemption. EPA has attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

Periods of startup, normal operations, and shutdown are all predictable and routine aspects of a source’s operations. However, by contrast, malfunction is defined as a “sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment or a process to operate in a normal or usual manner * * *” (40 CFR 63.2). EPA has determined that malfunctions should not be viewed as a distinct operating mode and, therefore, any emissions that occur at such times do not need to be factored into development of CAA section 112(d) standards, which, once promulgated, apply at all times. In *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1242 (DC Cir. 2004), the Court upheld as reasonable standards that had factored in variability of emissions under all operating conditions. However, nothing in CAA section 112(d) or in case law requires that EPA anticipate and

⁴ EPA’s responses to this and all other key recommendations of the SAB’s advisory on RTR risk assessment methodologies (which is available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/\\$File/EPA-SAB-10-007-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/4AB3966E263D943A8525771F00668381/$File/EPA-SAB-10-007-unsigned.pdf)) are outlined in a memo to this rulemaking docket from David Guinnup entitled, *EPA’s Actions in Response to the Key Recommendations of the SAB Review of RTR Risk Assessment Methodologies*.

account for the innumerable types of potential malfunction events in setting emission standards. See *Weyerhaeuser v. Costle*, 590 F.2d 1011, 1058 (DC Cir. 1978), (“In the nature of things, no general limit, individual permit, or even any upset provision can anticipate all upset situations. After a certain point, the transgression of regulatory limits caused by “uncontrollable acts of third parties,” such as strikes, sabotage, operator intoxication or insanity, and a variety of other eventualities, must be a matter for the administrative exercise of case-by-case enforcement discretion, not for specification in advance by regulation.”). Further, it is reasonable to interpret CAA section 112(d) as not requiring EPA to account for malfunctions in setting emissions standards. For example, we note that CAA section 112 uses the concept of “best performing” sources in defining MACT, the level of stringency that major source standards must meet. Applying the concept of “best performing” to a source that is malfunctioning presents significant difficulties. The goal of best performing sources is to operate in such a way as to avoid malfunctions of their units. Moreover, even if malfunctions were considered a distinct operating mode, we believe it would be impracticable to take malfunctions into account in setting CAA section 112(d) standards for shipbuilding and ship repair (surface coating) and wood furniture manufacturing operations. As noted above, by definition, malfunctions are sudden and unexpected events, and it would be difficult to set a standard that takes into account the myriad different types of malfunctions that can occur across all sources in each source category. Malfunctions can also vary in frequency, degree, and duration, further complicating standard setting.

In the event that a source fails to comply with the applicable CAA section 112(d) standards as a result of a malfunction event, EPA would determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during malfunction periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions. EPA would also consider whether the source’s failure to comply with the CAA section 112(d) standard was, in fact, “sudden, infrequent, not reasonably preventable” and was not instead “caused in part by poor maintenance or careless operation.” 40 CFR 63.2 (definition of malfunction).

Finally, EPA recognizes that even equipment that is properly designed and

maintained can sometimes fail and that such failure can sometimes cause or contribute to an exceedance of the relevant emission standard. (See, e.g., *State Implementation Plans: Policy Regarding Excessive Emissions During Malfunctions, Startup, and Shutdown* (September 20, 1999); *Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions* (February 15, 1983)). EPA is, therefore, proposing to add to the final rule an affirmative defense to civil penalties for exceedances of emission limits that are caused by malfunctions in both of the MACT standards addressed in this proposal. See 40 CFR 63.782 for sources subject to the Shipbuilding and Repair (Surface Coating) MACT standards, or 40 CFR 63.801 for sources subject to the Wood Furniture Manufacturing Operations MACT standards (defining “affirmative defense” to mean, in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding). We also are proposing other regulatory provisions to specify the elements that are necessary to establish this affirmative defense; a source subject to the Shipbuilding and Ship Repair (Surface Coating) MACT standards must prove by a preponderance of the evidence that it has met all of the elements set forth in 40 CFR 63.781(d) and a source subject to the Wood Furniture Manufacturing Operations MACT standards must prove by a preponderance of the evidence that it has met all of the elements set forth in 40 CFR 63.800(h). (See 40 CFR 22.24.) The criteria ensure that the affirmative defense is available only where the event that causes an exceedance of the emission limit meets the narrow definition of malfunction in 40 CFR 63.2 (sudden, infrequent, not reasonably preventable and not caused by poor maintenance and or careless operation). For example to successfully assert the affirmative defense, the source must prove by a preponderance of evidence that excess emissions “[w]ere caused by a sudden, short, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner.

* * * The criteria also are designed to ensure that steps are taken to correct the malfunction, to minimize emissions in accordance with 40 CFR 63.783(b)(1) for sources subject to the Shipbuilding and Ship Repair (Surface Coating) MACT

standards, or 40 CFR 63.802(c) for sources subject to the Wood Furniture Manufacturing Operations MACT standards, and to prevent future malfunctions. For example the source must prove by a preponderance of evidence that “[r]epairs were made as expeditiously as possible when the applicable emission limitations were being exceeded* * *” and that “[a]ll possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment and human health* * *” In any judicial or administrative proceeding, the Administrator may challenge the assertion of the affirmative defense and, if the respondent has not met its burden of proving all of the requirements in the affirmative defense, appropriate penalties may be assessed in accordance with section 113 of the CAA (see also 40 CFR 22.77).

IV. Analyses Performed

As discussed above, in this notice, we are taking the following actions: (1) we are proposing action to address the RTR requirements of CAA sections 112(d)(6) and (f)(2) for both the Shipbuilding and Ship Repair (Surface Coating) and the Wood Furniture Manufacturing Operations MACT standards; and, (2) we are proposing to revise the provisions in both of these MACT standards to address SSM to ensure that the SSM provisions are consistent with the Court decision in *Sierra Club v. EPA*, 551 F. 3d 1019. In this section, we describe the analyses performed to support the proposed decisions for the RTRs for each of these source categories.

A. How did we estimate risks posed by the source categories?

The EPA conducted risk assessments that provided estimates of the MIR posed by the HAP emissions from each source in a category, and, by each source category, the distribution of cancer risks within the exposed populations, cancer incidence, HI for chronic exposures to HAP with the potential to cause non-cancer health effects, HQ for acute exposures to HAP with the potential to cause non-cancer health effects, and an evaluation of the potential for adverse environmental effects. The risk assessments consisted of seven primary steps, as discussed below. The docket for this rulemaking contains the following documents which provide more information on the risk assessment inputs and models: *Draft Residual Risk Assessment for the Wood Furniture Manufacturing Operations Source Category*, and *Draft Residual Risk Assessment for the*

Shipbuilding and Ship Repair Source Category.

1. Establishing the Nature and Magnitude of Actual Emissions and Identifying the Emissions Release Characteristics

For the Shipbuilding and Ship Repair (Surface Coating) source category, we compiled preliminary datasets using readily-available information, reviewed the data, made changes where necessary, and shared these data with the public via an ANPRM. 72 FR 29287, March 29, 2007. The preliminary dataset was based on data in the 2002 *National Emissions Inventory (NEI) Final Inventory, Version 1* (made publicly available on February 26, 2006).⁵ The preliminary dataset was updated with information received in response to the ANPRM; data from the 2005 NEI, when that data became available; and additional data gathered by EPA. For more information see the *Memoranda Documenting Changes to the RTR Dataset for the Shipbuilding and Ship Repair (Surface Coating) Source Category*, dated November 22, 2010, which is available in the docket for this action. The updated dataset contains 85 facilities and was used to conduct the risk assessments and other analyses that form the basis for the proposed actions for the Shipbuilding and Ship Repair (Surface Coating) source category.

For the Wood Furniture Manufacturing Operations source category, we compiled preliminary datasets using the best data available, reviewed the data, and made changes where necessary. For this source category, we compiled the preliminary datasets using data in the 2005 NEI. After incorporation of changes to the dataset based on additional information gathered by EPA, an updated dataset was created. This updated dataset contains 385 facilities and was used to conduct the risk assessments and other analyses that form the basis for the proposed actions for the Wood Furniture Manufacturing Operations source category.

2. Establishing the Relationship Between Actual Emissions and MACT-Allowable Emissions Levels

The available emissions data in the NEI and from other sources typically represent the estimates of mass of

emissions actually emitted during the specified annual time period. These “actual” emission levels are often lower than the emission levels that a facility might be allowed to emit and still comply with the MACT standards. The emissions level allowed to be emitted by the MACT standards is referred to as the “MACT-allowable” emissions level. This represents the highest emissions level that could be emitted by the facility without violating the MACT standards.

We discussed the use of both MACT-allowable and actual emissions in the final Coke Oven Batteries residual risk rule (70 FR 19998–19999, April 15, 2005) and in the proposed and final HON residual risk rules (71 FR 34428, June 14, 2006, and 71 FR 76609, December 21, 2006, respectively). In those previous actions, we noted that assessing the risks at the MACT-allowable level is inherently reasonable since these risks reflect the maximum level sources could emit and still comply with national emission standards. But we also explained that it is reasonable to consider actual emissions, where such data are available, in both steps of the risk analysis, in accordance with the Benzene NESHAP. (54 FR 38044, September 14, 1989.) It is reasonable to consider actual emissions because sources typically seek to perform better than required by emission standards to provide an operational cushion to accommodate the variability in manufacturing processes and control device performance.

As described above, the actual emissions data were compiled based on the NEI, information gathered from companies, individual facilities, industry trade associations, states, and information received in response to the ANPRM. To estimate emissions at the MACT-allowable level, we developed a ratio of MACT-allowable to actual emissions for each emissions source type in each source category, based on the level of control required by the MACT standards compared to the level of reported actual emissions and available information on the level of control achieved by the emissions controls in use. For example, if there was information to suggest several facilities in the Shipbuilding and Ship Repair (Surface Coating) source category were using coatings that contain only 1 Kg of VOHAP compounds per Kg of coating solids (kg VOHAP/kg solids) while the MACT standards required coatings to contain no more than 2 kg VOHAP/kg solids, we would estimate that MACT-allowable emissions from emission points using these coatings could be as much as 2 times higher

(VOHAP content of 2 kg/kg solids allowed compared with VOHAP content of 1 kg/kg solids actually used), and the ratio of MACT-allowable to actual would be 2:1 for the emission points using these coatings at the facilities in this source category. After developing these ratios for each emission point type in each source category, we next applied these ratios on a facility-by-facility basis to the maximum chronic risk estimates from the inhalation risk assessment to obtain facility-specific maximum risk estimates based on MACT-allowable emissions. The estimates of MACT-allowable emissions for the Wood Furniture Manufacturing Operations and Shipbuilding and Ship Repair (Surface Coating) source categories are described in section V of this preamble.

3. Conducting Dispersion Modeling, Determining Inhalation Exposures, and Estimating Individual and Population Inhalation Risks

Both long-term and short-term inhalation exposure concentrations and health risks from each of the source categories addressed in this proposal were estimated using the HEM (Community and Sector HEM–3 version 1.1.0). The HEM–3 performs three of the primary risk assessment activities listed above: (1) Conducting dispersion modeling to estimate the concentrations of HAP in ambient air, (2) estimating long-term and short-term inhalation exposures to individuals residing within 50 km of the modeled sources, and (3) estimating individual and population-level inhalation risks using the exposure estimates and quantitative dose-response information.

The dispersion model used by HEM–3 is AERMOD, which is one of EPA’s preferred models for assessing pollutant concentrations from industrial facilities.⁶ To perform the dispersion modeling and to develop the preliminary risk estimates, HEM–3 draws on three data libraries. The first is a library of meteorological data, which is used for dispersion calculations. This library includes one year of hourly surface and upper air observations for 130 meteorological stations, selected to provide coverage of the United States and Puerto Rico. A second library of United States Census Bureau census block⁷ internal point

⁵ The NEI is a database that contains information about sources that emit criteria air pollutants and their precursors, and HAP. The database includes estimates of annual air pollutant emissions from point, non-point, and mobile sources in the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands. The EPA collects this information and releases an updated version of the NEI database every three years.

⁶ U.S. EPA. Revision to the *Guideline on Air Quality Models: Adoption of a Preferred General Purpose (Flat and Complex Terrain) Dispersion Model and Other Revisions* (70 FR 68218, November 9, 2005).

⁷ A census block is generally the smallest geographic area for which census statistics are tabulated.

locations and populations provides the basis of human exposure calculations (Census, 2000). In addition, for each census block, the census library includes the elevation and controlling hill height, which are also used in dispersion calculations. A third library of pollutant unit risk factors and other health benchmarks is used to estimate health risks. These risk factors and health benchmarks are the latest values recommended by EPA for HAP and other toxic air pollutants. These values are available at <http://www.epa.gov/ttn/atw/toxsource/summary.html> and are discussed in more detail later in this section.

In developing the risk assessment for chronic exposures, we used the estimated annual average ambient air concentration of each of the HAP emitted by each source for which we have emissions data in the source category. The air concentrations at each nearby census block centroid were used as a surrogate for the chronic inhalation exposure concentration for all the people who reside in that census block. We calculated the MIR for each facility as the cancer risk associated with a continuous lifetime (24 hours per day, 7 days per week, and 52 weeks per year for a 70-year period) exposure to the maximum concentration at the centroid of an inhabited census block. Individual cancer risks were calculated by multiplying the estimated lifetime exposure to the ambient concentration of each of the HAP (in micrograms per cubic meter) by its URE, which is an upper bound estimate of an individual's probability of contracting cancer over a lifetime of exposure to a concentration of 1 microgram of the pollutant per cubic meter of air. For residual risk assessments, we generally use URE values from EPA's IRIS. For carcinogenic pollutants without EPA IRIS values, we look to other reputable sources of cancer dose-response values, often using CalEPA URE values, where available. In cases where new, scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by EPA, we may use such dose-response values in place of, or in addition to, other values, if appropriate.

Formaldehyde is a unique case. In 2004, EPA determined that the CIIT dose-response value for formaldehyde (5.5×10^{-9} $\mu\text{g}/\text{m}^3$) was based on better science than the IRIS dose-response value (1.3×10^{-5} $\mu\text{g}/\text{m}^3$), and we switched from using the IRIS value to the CIIT value in risk assessments supporting regulatory actions. This

determination was based on a substantial body of research on the inhalation dosimetry for formaldehyde in rodents and primates by the CIIT Centers for Health Research (formerly the CIIT), with a focus on use of rodent data for refinement of the quantitative cancer dose-response assessment.^{8,9,10} The CIIT's risk assessment of formaldehyde incorporated mechanistic and dosimetric information on formaldehyde. However, recent research published by EPA indicates that, when the CIIT's two-stage modeling assumptions are varied, resulting dose-response estimates can vary by several orders of magnitude.^{11,12,13,14} These findings are not supportive of interpreting the CIIT model results as providing a conservative (health-protective) estimate of human risk.¹⁵ The recent EPA research also examined the contribution of the two-stage modeling for formaldehyde towards characterizing the relative weights of key events in the mode-of-action of a carcinogen. For example, in the EPA research, the model-based inference in the published CIIT study that formaldehyde's direct mutagenic action is not relevant to the compound's tumorigenicity was found not to hold under variations of modeling

⁸Conolly, RB, Kimbell, JS, Janszen, D, Schlosser, PM, Kalisak, D, Preston, J, and Miller, FJ. 2003. *Biologically Motivated Computational Modeling of Formaldehyde Carcinogenicity in the F344 Rat*. *Tox Sci* 75: 432–447.

⁹Conolly, RB, Kimbell, JS, Janszen, D, Schlosser, PM, Kalisak, D, Preston, J, and Miller, FJ. 2004. *Human Respiratory Tract Cancer Risks of Inhaled Formaldehyde: Dose-Response Predictions Derived from Biologically-Motivated Computational Modeling of a Combined Rodent and Human Dataset*. *Tox Sci* 82: 279–296.

¹⁰Chemical Industry Institute of Toxicology (CIIT). 1999. *Formaldehyde: Hazard Characterization and Dose-Response Assessment for Carcinogenicity by the Route of Inhalation*. CIIT, September 28, 1999. Research Triangle Park, NC.

¹¹U.S. EPA. *Analysis of the Sensitivity and Uncertainty in 2-Stage Clonal Growth Models for Formaldehyde with Relevance to Other Biologically-Based Dose Response (BBDR) Models*. U.S. EPA, Washington, D.C., EPA/600/R-08/103, 2008.

¹²Subramaniam, R; Chen, C; Crump, K; et al. (2008). *Uncertainties in Biologically-Based Modeling of Formaldehyde-Induced Cancer Risk: Identification of Key Issues*. *Risk Anal* 28 (4):907–923.

¹³Subramaniam RP; Crump KS; Van Landingham C; White P; Chen C; Schlosser PM (2007). *Uncertainties in the CIIT model for formaldehyde-induced carcinogenicity in the rat: A limited sensitivity analysis-I*. *Risk Anal*, 27: 1237–1254.

¹⁴Crump, K; Chen, C; Fox, J; et al. (2008). *Sensitivity Analysis of Biologically Motivated Model for Formaldehyde-Induced Respiratory Cancer in Humans*. *Ann Occup Hyg* 52:481–495.

¹⁵Crump, K; Chen, C; Fox, J; et al. (2008). *Sensitivity Analysis of Biologically Motivated Model for Formaldehyde-Induced Respiratory Cancer in Humans*. *Ann Occup Hyg* 52:481–495.

assumptions.¹⁶ As a result of these findings, we no longer considered the CIIT URE value health protective, and we are again using the EPA's current value on IRIS, which was last revised in 1991, and which is more than 2000 times greater than the CIIT value. We note that a new IRIS re-assessment has been drafted and sent to the NAS for review. The NAS review is expected to be completed by March of 2011. We also note that POM, a carcinogenic HAP with a mutagenic mode of action, is emitted by some of the facilities in these two categories.¹⁷ For this compound group,¹⁸ the ADAF described in EPA's *Supplemental Guidance for Assessing Susceptibility from Early-Life Exposure to Carcinogens*¹⁹ were applied. This adjustment has the effect of increasing the estimated lifetime risks for POM by a factor of 1.6. In addition, although only a small fraction of the total POM emissions were not reported as individual compounds, EPA expresses carcinogenic potency for compounds in this group in terms of benzo[a]pyrene equivalence, based on evidence that carcinogenic POM has the same mutagenic mechanism of action as benzo[a]pyrene. For this reason, EPA's Science Policy Council²⁰ recommends applying the *Supplemental Guidance* to all carcinogenic polycyclic aromatic hydrocarbons for which risk estimates are based on relative potency. Accordingly, we have applied the ADAF to the benzo[a]pyrene equivalent portion of all POM mixtures.

Incremental individual lifetime cancer risks associated with emissions from the source category were estimated as the sum of the risks for each of the carcinogenic HAP (including those classified as carcinogenic to humans, likely to be carcinogenic to humans, and suggestive evidence of carcinogenic

¹⁶Subramaniam RP; Crump KS; Van Landingham C; White P; Chen C; Schlosser PM (2007). *Uncertainties in the CIIT model for formaldehyde-induced carcinogenicity in the rat: A limited sensitivity analysis-I*. *Risk Anal*, 27: 1237–1254.

¹⁷U.S. EPA, 2005. Performing risk assessments that include carcinogens described in the *Supplemental Guidance* as having a mutagenic mode of action. *Science Policy Council Cancer Guidelines Implementation Work Group Communication II: Memo from W.H. Farland*, dated October 4, 2005.

¹⁸See the *Risk Assessment for Source Categories* document available in the docket for a list of HAP with a mutagenic mode of action.

¹⁹U.S. EPA, 2005. *Supplemental Guidance for Assessing Early-Life Exposure to Carcinogens*. EPA/630/R-03/003F. http://www.epa.gov/ttn/atw/childrens_supplement_final.pdf.

²⁰U.S. EPA, 2006. *Science Policy Council Cancer Guidelines Implementation Workgroup Communication II: Memo from W.H. Farland*, dated June 14, 2006.

potential²¹) emitted by the modeled source. Cancer incidence and the distribution of individual cancer risks for the population within 50 km of any source were also estimated for the source category as part of these assessments by summing individual risks. A distance of 50 km is consistent with both the analysis supporting the 1989 Benzene NESHAP (54 FR 38044) and the limitations of Gaussian dispersion models, including AERMOD.

To assess risk of non-cancer health effects from chronic exposures, we summed the HQ for each of the HAP that affects a common target organ system to obtain the HI for that target organ system (or target organ-specific HI, TOSHI). The HQ for chronic exposures is the estimated chronic exposure divided by the chronic reference level, which is either the EPA RfC, defined as “an estimate (with uncertainty spanning perhaps an order of magnitude) of a continuous inhalation exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime,” or, in cases where an RfC from EPA’s IRIS database is not available, EPA will utilize the following prioritized sources for our chronic dose-response values: (1) The *ATSDR* MRL, which is defined as “an estimate of daily human exposure to a substance that is likely to be without an appreciable risk of adverse effects (other than cancer) over a specified duration of exposure”; (2) the CalEPA Chronic REL, which is defined as “the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration;” and (3) as noted above, in cases where scientifically credible dose-response values have been developed in a manner consistent with EPA guidelines and have undergone a peer review process similar to that used by EPA, we may use those dose-response values in place of, or in concert with other values.

Screening estimates of acute exposures and risks were also evaluated for each of the HAP at the point of highest off-site exposure for each facility

(i.e., not just the census block centroids) assuming that a person is located at this spot at a time when both the peak (hourly) emission rate and hourly dispersion conditions (1991 calendar year data) occur. The acute HQ is the estimated acute exposure divided by the acute dose-response value. In each case, acute HQ values were calculated using best available, short-term dose-response values. These acute dose-response values, which are described below, include the acute REL, AEGL, and ERPG for 1-hour exposure durations. As discussed below, we used conservative assumptions for emission rates, meteorology, and exposure location for our acute analysis.

As described in the CalEPA’s *Air Toxics Hot Spots Program Risk Assessment Guidelines, Part I, The Determination of Acute Reference Exposure Levels for Airborne Toxicants*, an acute REL value (<http://www.oehha.ca.gov/air/pdf/acutereel.pdf>) is defined as “the concentration level at or below which no adverse health effects are anticipated for a specified exposure duration.” Acute REL values are based on the most sensitive, relevant, adverse health effect reported in the medical and toxicological literature. Acute REL values are designed to protect the most sensitive individuals in the population by the inclusion of margins of safety. Since margins of safety are incorporated to address data gaps and uncertainties, exceeding the acute REL does not automatically indicate an adverse health impact.

Acute Exposure Guideline Levels values were derived in response to recommendations from the NRC. As described in *Standing Operating Procedures (SOP) of the National Advisory Committee on Acute Exposure Guideline Levels for Hazardous Substances* (<http://www.epa.gov/opptintr/aegl/pubs/sop.pdf>),²² “the NRC’s previous name for acute exposure levels—community emergency exposure levels (CEEL)—was replaced by the term AEGL to reflect the broad application of these values to planning, response, and prevention in the community, the workplace, transportation, the military, and the remediation of Superfund sites.” This document also states that AEGL values “represent threshold exposure limits for the general public and are applicable to emergency exposures ranging from 10 minutes to eight hours.” The document lays out the purpose and objectives of

AEGL by stating (page 21) that “the primary purpose of the AEGL program and the NAC/AEGL Committee is to develop guideline levels for once-in-a-lifetime, short-term exposures to airborne concentrations of acutely toxic, high-priority chemicals.” In detailing the intended application of AEGL values, the document states (page 31) that “[i]t is anticipated that the AEGL values will be used for regulatory and nonregulatory purposes by United States Federal and State agencies, and possibly the international community in conjunction with chemical emergency response, planning, and prevention programs. More specifically, the AEGL values will be used for conducting various risk assessments to aid in the development of emergency preparedness and prevention plans, as well as real-time emergency response actions, for accidental chemical releases at fixed facilities and from transport carriers.”

The AEGL-1 value is then specifically defined as “the airborne concentration of a substance above which it is predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects. However, the effects are not disabling and are transient and reversible upon cessation of exposure.” The document also notes (page 3) that, “Airborne concentrations below AEGL-1 represent exposure levels that can produce mild and progressively increasing but transient and nondisabling odor, taste, and sensory irritation or certain asymptomatic, nonsensory effects.” Similarly, the document defines AEGL-2 values as “the airborne concentration (expressed as ppm or mg/m³) of a substance above which it is predicted that the general population, including susceptible individuals, could experience irreversible or other serious, long-lasting adverse health effects or an impaired ability to escape.”

Emergency Response Planning Guidelines values are derived for use in emergency response, as described in the American Industrial Hygiene Association’s document entitled, *Emergency Response Planning Guidelines (ERPG) Procedures and Responsibilities* (<http://www.aiha.org/1documents/committees/ERPSOPs2006.pdf>), which states that, “Emergency Response Planning Guidelines were developed for emergency planning and are intended as health based guideline concentrations

²¹ These classifications also coincide with the terms “known carcinogen, probable carcinogen, and possible carcinogen,” respectively, which are the terms advocated in the EPA’s previous *Guidelines for Carcinogen Risk Assessment*, published in 1986 (51 FR 33992, September 24, 1986). Summing the risks of these individual compounds to obtain the cumulative cancer risks is an approach that was recommended by the EPA’s SAB in their 2002 peer review of EPA’s NATA entitled, *NATA—Evaluating the National-scale Air Toxics Assessment 1996 Data—an SAB Advisory*, available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/\\$File/ecadv02001.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/214C6E915BB04E14852570CA007A682C/$File/ecadv02001.pdf).

²² National Academies of Science, 2001. *Standing Operating Procedures for Developing Acute Exposure Levels for Hazardous Chemicals*, page 2.

for single exposures to chemicals.”²³ The ERPG-1 value is defined as “the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing other than mild transient adverse health effects or without perceiving a clearly defined, objectionable odor.” Similarly, the ERPG-2 value is defined as “the maximum airborne concentration below which it is believed that nearly all individuals could be exposed for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms which could impair an individual’s ability to take protective action.”

As can be seen from the definitions above, the AEGL and ERPG values include the similarly-defined severity levels one and 2. For many chemicals, a severity level one value AEGL or ERPG has not been developed; in these instances, higher severity level AEGL-2 or ERPG-2 values are compared to our modeled exposure levels to screen for potential acute concerns.

Acute REL values for one hour exposure durations are typically lower than their corresponding AEGL-1 and ERPG-1 values. Even though their definitions are slightly different, AEGL-1 values are often the same as the corresponding ERPG-1 values, and AEGL-2 values are often equal to ERPG-2 values. Maximum HQ values from our acute screening risk assessments typically result when basing them on the acute REL value for a particular pollutant. In cases where our maximum acute HQ value exceeds 1, we also report the HQ value based on the next highest acute dose-response value (usually the AEGL-1 and/or the ERPG-1 value).

To develop screening estimates of acute exposures, we developed estimates of maximum hourly emission rates by multiplying the average actual annual hourly emission rates by a factor to cover routinely variable emissions. We chose the factor based on process knowledge and engineering judgment and with awareness of a Texas study of short-term emissions variability, which showed that most peak emission events, in a heavily-industrialized 4-county area (Harris, Galveston, Chambers, and Brazoria Counties, Texas) were less than twice the annual average hourly emission rate. The highest peak emission event was 74 times the annual average hourly emission rate, and the 99th percentile ratio of peak hourly

emission rate to the annual average hourly emission rate was 9.²⁴ This analysis is provided in Appendix 4 of the *Draft Residual Risk Assessment for Wood Furniture Manufacturing Operations*, and *Draft Residual Risk Assessment for Shipbuilding and Ship Repair (Surface Coating)* which are available in the docket for this action. Considering this analysis, unless specific process knowledge or data are available to provide an alternate value, to account for more than 99 percent of the peak hourly emissions, we apply a conservative screening multiplication factor of 10 to the average annual hourly emission rate in these acute exposure screening assessments. For the Shipbuilding and Ship Repair (Surface Coating) source category, this factor of 10 was applied. For the Wood Furniture Manufacturing Operations source category, a factor of 4 was applied, based on emissions data provided by industry. More information supporting the use of this factor for Wood Furniture Manufacturing Operations is presented in the memorandum, *Acute Effects Factor for Wood Furniture Manufacturing Operations*, dated November 23, 2010, which is available in the docket for this action. We solicit comment on this factor and the data used to calculate it.

In cases where all acute HQ values from the screening step were less than or equal to 1, acute impacts were deemed negligible and no further analysis was performed. In the cases where an acute HQ from the screening step was greater than 1, additional site-specific data were considered to develop a more refined estimate of the potential for acute impacts of concern. The data refinements employed for these source categories consisted of using the site-specific facility layout to distinguish facility property from an area where the public could be exposed. These refinements are discussed in the draft risk assessment documents, which are available in the docket, for each of these source categories. Ideally, we would prefer to have continuous measurements over time to see how the emissions vary by each hour over an entire year. Having a frequency distribution of hourly emission rates over a year would allow us to perform a probabilistic analysis to estimate potential threshold exceedances and their frequency of occurrence. Such an evaluation could include a more complete statistical treatment of the key parameters and elements adopted in this

screening analysis. However, we recognize that having this level of data is rare, hence our use of the multiplier approach.

4. Conducting Multi-Pathway Exposure and Risk Modeling

The potential for significant human health risks due to exposures via routes other than inhalation (*i.e.*, multi-pathway exposures) and the potential for adverse environmental impacts were evaluated in a three-step process. In the first step, we determined whether any facilities emitted any HAP known to be PB-HAP. There are 14 PB-HAP compounds or compound classes identified for this screening in EPA’s *Air Toxics Risk Assessment Library* (available at http://www.epa.gov/ttn/fera/risk_atra_vol1.html). They are cadmium compounds, chlordane, chlorinated dibenzodioxins and furans, dichlorodiphenyldichloroethylene, heptachlor, hexachlorobenzene, hexachlorocyclohexane, lead compounds, mercury compounds, methoxychlor, polychlorinated biphenyls, POM, toxaphene, and trifluralin.

Since one or more of these PB-HAP are emitted by facilities in both source categories, we proceeded to the second step of the evaluation. In this step, we determined whether the facility-specific emission rates of each of the emitted PB-HAP were large enough to create the potential for significant non-inhalation risks. To facilitate this step, we have developed emission rate thresholds for each PB-HAP using a hypothetical screening exposure scenario developed for use in conjunction with the EPA’s TRIM.FaTE model. The hypothetical screening scenario was subjected to a sensitivity analysis to ensure that its key design parameters were established such that environmental media concentrations were not underestimated (*i.e.*, to minimize the occurrence of false negatives, or results that suggest that risks might be acceptable when, in fact, actual risks are high), and to also minimize the occurrence of false positives for human health endpoints. We call this application of the TRIM.FaTE model TRIM-Screen. The facility-specific emission rates of each of the PB-HAP in each source category were compared to the emission threshold values for each of the PB-HAP identified in the source category datasets.

For all of the facilities in the source categories addressed in this proposal, all of the PB-HAP emission rates were less than the emission threshold values. As a result of this, multi-pathway exposures and environmental risks were

²³ ERP Committee Procedures and Responsibilities. 1 November, 2006. American Industrial Hygiene Association.

²⁴ See http://www.tceq.state.tx.us/compliance/field_ops/eeer/index.html or docket to access the source of these data.

deemed negligible and no further analysis was performed. If the emission rates of the PB-HAP had been above the emission threshold values, the source categories would have been further evaluated for potential non-inhalation risks and adverse environmental effects in a third step through site-specific refined assessments using EPA's TRIM.FaTE model.

For further information on the multi-pathway analysis approach, see the residual risk documentation as referenced in section IV.A of this preamble.

5. Assessing Risks Considering Emissions Control Options

In addition to assessing baseline inhalation risks and screening for potential multi-pathway risks, where appropriate, we also estimated risks considering the potential emission reductions that would be achieved by the particular control options under consideration. In these cases, the expected emissions reductions were applied to the specific HAP and emissions sources in the source category dataset to develop corresponding estimates of risk reductions.

6. Conducting Other Risk-Related Analyses, Including Facility-Wide Assessments and Demographic Analyses

a. Facility-Wide Risk

To put the source category risks in context, we also examined the risks from the entire "facility," where the facility includes all HAP-emitting operations within a contiguous area and under common control. In other words, for each facility that includes one or more sources from one of the source categories under review, we examined the HAP emissions, not only from the source category of interest, but also emissions of HAP from all other emission sources at the facility. The emissions data for generating these "facility-wide" risks were obtained from the 2005 NATA emissions inventory (available at <http://www.epa.gov/ttn/atw/nata2005>). We estimated the risks due to the inhalation of HAP that are emitted "facility-wide" for the populations residing within 50 km of each facility, consistent with the methods used for the source category analysis described above. For these facility-wide risk analyses, the modeled source category risks were compared to the facility-wide risks to determine the portion of facility-wide risks that could be attributed to the source categories addressed in this proposal. We specifically examined the facilities associated with the highest estimates of

risk and determined the percentage of that risk attributable to the source category of interest. The risk documentation available through the docket for this action provides all the facility-wide risks and the percentage of source category contribution for all source categories assessed.

The methodology and the results of the facility-wide analyses for each source category are included in the residual risk documentation as referenced in section IV.A of this preamble, which is available in the docket for this action.

b. Demographic Analysis

To examine the potential for any EJ issues that might be associated with each source category, we evaluated the distributions of HAP-related cancer and non-cancer risks across different social, demographic, and economic groups within the populations living near the facilities where these source categories are located. The development of demographic analyses to inform the consideration of EJ issues in EPA rulemakings is an evolving science. The EPA offers the demographic analyses in this rulemaking to inform the consideration of potential EJ issues, and invites public comment on the approaches used and the interpretations made from the results, with the hope that this will support the refinement and improve the utility of such analyses for future rulemakings.

For the demographic analyses, we focus on the populations within 50 km of any facility estimated to have exposures to HAP which result in cancer risks of 1-in-1 million or greater, or non-cancer HI of 1 or greater (based on the emissions of the source category or the facility, respectively). We examine the distributions of those risks across various demographic groups, comparing the percentages of particular demographic groups to the total number of people in those demographic groups nationwide. The results, including other risk metrics, such as average risks for the exposed populations, are documented in source category-specific technical reports in the docket for both source categories covered in this proposal.²⁵

The basis for the risk values used in these analyses was the modeling results based on actual emissions levels obtained from the HEM-3 model described above. The risk values for

each census block were linked to a database of information from the 2000 Decennial census that includes data on race and ethnicity, age distributions, poverty status, household incomes, and education level. The Census Department Landview® database was the source of the data on race and ethnicity, and the data on age distributions, poverty status, household incomes, and education level were obtained from the SF3 Long Form. While race and ethnicity census data are available at the census block level, the age and income census data are only available at the census block group level (which includes an average of 26 blocks or an average of 1,350 people). Where census data are available at the block group level but not the block level, we assumed that all census blocks within the block group have the same distribution of ages and incomes as the block group.

For each source category, we focused on those census blocks where source category risk results show estimated lifetime inhalation cancer risks above 1-in-1 million or chronic non-cancer indices above 1, and determined the relative percentage of different racial and ethnic groups, different age groups, adults with and without a high school diploma, people living in households below the national median income, and for people living below the poverty line within those census blocks. The specific census population categories studied include:

- Total population
- White
- African American (or Black)
- Native Americans
- Other races and multiracial
- Hispanic or Latino
- Children 18 years of age and under
- Adults 19 to 64 years of age
- Adults 65 years of age and over
- Adults without a high school diploma
- Households earning under the national median income
- People living below the poverty line

It should be noted that these categories overlap in some instances, resulting in some populations being counted in more than one category (e.g., other races and multiracial and Hispanic). In addition, while not a specific census population category, we also examined risks to "Minorities," a classification which is defined for these purposes as all race population categories except white.

For further information about risks to the populations located near the facilities in these source categories, we also evaluated the estimated distribution of inhalation cancer and chronic non-cancer risks associated

²⁵ For example, the report pertaining to the Shipbuilding and Ship Repair (Surface Coating) source category is entitled *Risk and Technology Review—Analysis of Socio-Economic Factors for Populations Living Near Shipbuilding and Ship Repair (Surface Coating) Operations*.

with the HAP emissions from all the emissions sources at the facility (*i.e.*, facility-wide). This analysis used the facility-wide RTR modeling results and the census data described above.

The methodology and the results of the demographic analyses for each source category are included in a source category-specific technical report for each of the categories, which are available in the docket for this action.

7. Considering Uncertainties in Risk Assessment

Uncertainty and the potential for bias are inherent in all risk assessments, including those performed for the source categories addressed in this proposal. Although uncertainty exists, we believe that our approach, which used conservative tools and assumptions, ensures that our decisions are health-protective. A brief discussion of the uncertainties in the emissions datasets, dispersion modeling, inhalation exposure estimates, and dose-response relationships follows below. A more thorough discussion of these uncertainties is included in the risk assessment documentation (referenced earlier) available in the docket for this action.

a. Uncertainties in the Emissions Datasets

Although the development of the RTR datasets involved quality assurance/quality control processes, the accuracy of emissions values will vary depending on the source of the data, the degree to which data are incomplete or missing, the degree to which assumptions made to complete the datasets are inaccurate, errors in estimating emissions values, and other factors. The emission estimates considered in this analysis generally are annual totals for certain years that do not reflect short-term fluctuations during the course of a year or variations from year to year. Additionally, we are aware of a potential impact on emissions from a chemical reaction during the curing and gluing of parts in this source category,²⁶ which may not be reflected in our emissions inventory. For example, we believe formaldehyde may be formed during the chemical process of curing of some coatings formulations, such as conversion varnishes, which are commonly used at some wood furniture manufacturing operations. Currently, there are no EPA-approved methods for estimating formaldehyde emissions from wood furniture coatings that could

potentially be formed as a result of the curing process. This is an uncertainty that could potentially bias the risk estimates; however, the extent of this bias is unknown. We request comment on the extent to which wood furniture coatings covered by this source category, including but not limited to conversion varnishes, undergo a chemical reaction during the curing process that yields formaldehyde, and associated methods for quantifying the resultant impact on emission levels.

The estimates of peak hourly emission rates for the acute effects screening assessment were based on multiplication factors applied to the average annual hourly emission rates (the default factor of 10 was used for Shipbuilding and Ship Repair (Surface Coating) and a factor of 4 was used for Wood Furniture Manufacturing Operations), which are intended to account for emission fluctuations due to normal facility operations. Additionally, although we believe that we have data for most facilities in these two source categories in our RTR dataset, our dataset may not include data for all existing facilities. Moreover, there are significant uncertainties with regard to the identification of sources as major or area in the NEI for these source categories. While we published an ANPRM for Shipbuilding and Ship Repair (Surface Coating) and received additional data, we did not publish an ANPRM for Wood Furniture Manufacturing due to time constraints.

b. Uncertainties in Dispersion Modeling

While the analysis employed EPA's recommended regulatory dispersion model, AERMOD, we recognize that there is uncertainty in ambient concentration estimates associated with any model, including AERMOD. In circumstances where we had to choose between various model options, where possible, model options (*e.g.*, rural/urban, plume depletion, chemistry) were selected to provide an overestimate of ambient air concentrations of the HAP rather than underestimates. However, because of practicality and data limitation reasons, some factors (*e.g.*, meteorology, building downwash) have the potential in some situations to overestimate or underestimate ambient impacts. For example, meteorological data were taken from a single year (1991), and facility locations can be a significant distance from the site where these data were taken. Despite these uncertainties, we believe that at off-site locations and census block centroids, the approach considered in the dispersion modeling analysis should generally yield

overestimates of ambient HAP concentrations.

c. Uncertainties in Inhalation Exposure

The effects of human mobility on exposures were not included in the assessment. Specifically, short-term mobility and long-term mobility between census blocks in the modeling domain were not considered.²⁷ As a result, this simplification will likely bias the assessment toward overestimating the highest exposures. In addition, the assessment predicted the chronic exposures at the centroid of each populated census block as surrogates for the exposure concentrations for all people living in that block. Using the census block centroid to predict chronic exposures tends to over-predict exposures for people in the census block who live further from the facility, and under-predict exposures for people in the census block who live closer to the facility. Thus, using the census block centroid to predict chronic exposures may lead to a potential understatement or overstatement of the true maximum impact, but is an unbiased estimate of average risk and incidence.

The assessments evaluate the cancer inhalation risks associated with continuous pollutant exposures over a 70-year period, which is the assumed lifetime of an individual. In reality, both the length of time that modeled emissions sources at facilities actually operate (*i.e.*, more or less than 70 years), and the domestic growth or decline of the modeled industry (*i.e.*, the increase or decrease in the number or size of United States facilities), will influence the risks posed by a given source category. Depending on the characteristics of the industry, these factors will, in most cases, result in an overestimate both in individual risk levels and in the total estimated number of cancer cases. However, in rare cases, where a facility maintains or increases its emission levels beyond 70 years, residents live beyond 70 years at the same location, and the residents spend most of their days at that location, then the risks could potentially be underestimated. Annual cancer incidence estimates from exposures to emissions from these sources would not be affected by uncertainty in the length of time emissions sources operate.

The exposure estimates used in these analyses assume chronic exposures to ambient levels of pollutants. Because

²⁶ Howard *et al.* (1998). *Indoor Emissions from Conversion Varnishes*. Air & Waste Management Assoc. 48:924–930.

²⁷ Short-term mobility is movement from one microenvironment to another over the course of hours or days. Long-term mobility is movement from one residence to another over the course of a lifetime.

most people spend the majority of their time indoors, actual exposures may not be as high, depending on the characteristics of the pollutants modeled. For many of the HAP, indoor levels are roughly equivalent to ambient levels, but for very reactive pollutants or larger particles, these levels are typically lower. This factor has the potential to result in an overstatement of 25 to 30 percent of exposures.²⁸

In addition to the uncertainties highlighted above, there are several factors specific to the acute exposure assessment that should be highlighted. The accuracy of an acute inhalation exposure assessment depends on the simultaneous occurrence of independent factors that may vary greatly, such as hourly emissions rates, meteorology, and human activity patterns. In this assessment, we assume that individuals remain for one hour at the point of maximum ambient concentration as determined by the co-occurrence of peak emissions and worst-case meteorological conditions. These assumptions would tend to overestimate actual exposures since it is unlikely that a person would be located at the point of maximum exposure during the time of worst-case impact.

d. Uncertainties in Dose-Response Relationships

There are uncertainties inherent in the development of the dose-response values used in our risk assessments for cancer effects from chronic exposures and non-cancer effects from both chronic and acute exposures. Some uncertainties may be considered quantitatively, and others generally are expressed in qualitative terms. We note as a preface to this discussion a point on dose-response uncertainty that is brought out in EPA's *2005 Cancer Guidelines*; namely, that "the primary goal of EPA actions is protection of human health; accordingly, as an Agency policy, risk assessment procedures, including default options that are used in the absence of scientific data to the contrary, should be health protective." (*EPA 2005 Cancer Guidelines*, pages 1–7.) This is the approach followed here as summarized in the next several paragraphs. A complete detailed discussion of uncertainties and variability in dose-response relationships is given in the residual risk documentation as referenced in section IV.A of this preamble, which is available in the docket for this action.

Cancer URE values used in our risk assessments are those that have been developed to generally provide an upper bound estimate of risk. That is, they represent a "plausible upper limit to the true value of a quantity" (although this is usually not a true statistical confidence limit).²⁹ In some circumstances, the true risk could be as low as zero; however, in other circumstances the risk could also be greater.³⁰ When developing an upper bound estimate of risk and to provide risk values that do not underestimate risk, health-protective default approaches are generally used. To err on the side of ensuring adequate health-protection, EPA typically uses the upper bound estimates rather than lower bound or central tendency estimates in our risk assessments, an approach that may have limitations for other uses (e.g., priority-setting or expected benefits analysis).

Chronic non-cancer reference (RfC and RfD) values represent chronic exposure levels that are intended to be health-protective levels. Specifically, these values provide an estimate (with uncertainty spanning perhaps an order of magnitude) of daily oral exposure (RfD) or of a continuous inhalation exposure (RfC) to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime. To derive values that are intended to be "without appreciable risk," the methodology relies upon an UF approach (U.S. EPA, 1993, 1994) which includes consideration of both uncertainty and variability. When there are gaps in the available information, UF are applied to derive reference values that are intended to protect against appreciable risk of deleterious effects. The UF are commonly default values,³¹ e.g., factors of 10 or 3, used in

the absence of compound-specific data; where data are available, UF may also be developed using compound-specific information. When data are limited, more assumptions are needed and more UF are used. Thus, there may be a greater tendency to overestimate risk in the sense that further study might support development of reference values that are higher (i.e., less potent) because fewer default assumptions are needed. However, for some pollutants, it is possible that risks may be underestimated. While collectively termed "UF," these factors account for a number of different quantitative considerations when using observed animal (usually rodent) or human toxicity data in the development of the RfC. The UF are intended to account for: (1) Variation in susceptibility among the members of the human population (i.e., inter-individual variability); (2) uncertainty in extrapolating from experimental animal data to humans (i.e., interspecies differences); (3) uncertainty in extrapolating from data obtained in a study with less-than-lifetime exposure (i.e., extrapolating from sub-chronic to chronic exposure); (4) uncertainty in extrapolating the observed data to obtain an estimate of the exposure associated with no adverse effects; and (5) uncertainty when the database is incomplete or there are problems with the applicability of available studies. Many of the UF used to account for variability and uncertainty in the development of acute reference values are quite similar to those developed for chronic durations, but they more often use individual UF values that may be less than 10. Uncertainty factors are applied based on chemical-specific or health effect-specific information (e.g., simple irritation effects do not vary appreciably between human individuals, hence a value of 3 is typically used), or based on the purpose for the reference value (see the following paragraph). The UF applied in acute reference value derivation include: (1) Heterogeneity among humans; (2) uncertainty in extrapolating from animals to humans; (3) uncertainty in lowest observed adverse effect (exposure) level to no observed adverse effect (exposure) level adjustments; and (4) uncertainty in accounting for an incomplete database on toxic effects of potential concern. Additional adjustments are often

environment, default assumptions are used to ensure that risk to chemicals is not underestimated (although defaults are not intended to overtly overestimate risk). See EPA, 2004, *An Examination of EPA Risk Assessment Principles and Practices*, EPA/100/B-04/001 available at:

<http://www.epa.gov/osa/pdfs/ratf-final.pdf>.

²⁸ U.S. EPA. *National-Scale Air Toxics Assessment* for 1996. (EPA 453/R-01-003; January 2001; page 85.)

²⁹ IRIS glossary (http://www.epa.gov/NCEA/iris/help_gloss.htm).

³⁰ An exception to this is the URE for benzene, which is considered to cover a range of values, each end of which is considered to be equally plausible, and which is based on maximum likelihood estimates.

³¹ According to the NRC report, *Science and Judgment in Risk Assessment* (NRC, 1994) "[Default] options are generic approaches, based on general scientific knowledge and policy judgment, that are applied to various elements of the risk assessment process when the correct scientific model is unknown or uncertain." The 1983 NRC report, *Risk Assessment in the Federal Government: Managing the Process*, defined default option as "the option chosen on the basis of risk assessment policy that appears to be the best choice in the absence of data to the contrary" (NRC, 1983a, p. 63). Therefore, default options are not rules that bind the Agency; rather, the Agency may depart from them in evaluating the risks posed by a specific substance when it believes this to be appropriate. In keeping with EPA's goal of protecting public health and the

applied to account for uncertainty in extrapolation from observations at one exposure duration (e.g., four hours) to derive an acute reference value at another exposure duration (e.g., one hour).

Not all acute reference values are developed for the same purpose, and care must be taken when interpreting the results of an acute assessment of human health effects relative to the reference value or values being exceeded. Where relevant to the estimated exposures, the lack of short-term dose-response values at different levels of severity should be factored into the risk characterization as potential uncertainties.

Although every effort is made to identify peer-reviewed reference values for cancer and non-cancer effects for all pollutants emitted by the sources included in this assessment, some HAP continue to have no reference values for cancer or chronic non-cancer or acute effects. Since exposures to these pollutants cannot be included in a quantitative risk estimate, an understatement of risk for these pollutants at environmental exposure levels is possible. For a group of compounds that are either unsplicated or do not have reference values for every individual compound (e.g., glycol ethers), we conservatively use the most protective reference value to estimate risk from individual compounds in the group of compounds.

Additionally, chronic reference values for several of the compounds included in this assessment are currently under EPA IRIS review, and revised assessments may determine that these pollutants are more or less potent than the current value. We may re-evaluate residual risks for the final rulemaking if, as a result of these reviews, a dose-response metric changes enough to indicate that the risk assessment supporting this notice may significantly understate human health risk.

e. Uncertainties in the Multi-Pathway and Environmental Effects Assessment

We generally assume that when exposure levels are not anticipated to adversely affect human health, they also are not anticipated to adversely affect the environment. For each source category, we generally rely on the site-specific levels of PB-HAP emissions to determine whether a full assessment of the multi-pathway and environmental effects is necessary. Because site-specific PB-HAP emission levels were so far below levels which would trigger a refined assessment of multi-pathway impacts, we are confident that these

types of impacts are insignificant for these source categories.

f. Uncertainties in the Facility-Wide Risk Assessment

Given that the same general analytical approach and the same models were used to generate facility-wide risk results as were used to generate the source category risk results, the same types of uncertainties discussed above for our source category risk assessments apply to the facility-wide risk assessments. Additionally, the degree of uncertainty associated with facility-wide emissions and risks is likely greater because we generally have not conducted a thorough engineering review of emissions data for source categories not currently undergoing an RTR review.

g. Uncertainties in the Demographic Analysis

Our analysis of the distribution of risks across various demographic groups is subject to the typical uncertainties associated with census data (e.g., errors in filling out and transcribing census forms), as well as the additional uncertainties associated with the extrapolation of census-block group data (e.g., income level and education level) down to the census block level.

B. How did we perform the technology review?

Our technology review is focused on the identification and evaluation of “developments in practices, processes, and control technologies” since the promulgation of the existing MACT standard. If a review of available information identifies such developments, then we conduct an analysis of the technical feasibility of requiring the implementation of these developments, along with the impacts (costs, emission reductions, risk reductions, etc.). We then make a decision on whether it is necessary to amend the regulation to require these developments.

Based on specific knowledge of each source category, we began by identifying known developments in practices, processes, and control technologies. For the purpose of this exercise, we considered any of the following to be a “development”:

- Any add-on control technology or other equipment that was not identified and considered during MACT development;
- Any improvements in add-on control technology or other equipment (that was identified and considered during MACT development) that could

result in significant additional emission reduction;

- Any work practice or operational procedure that was not identified and considered during MACT development; and
- Any process change or pollution prevention alternative that could be broadly applied that was not identified and considered during MACT development.

In addition to looking back at practices, processes, or control technologies reviewed at the time we developed the MACT standards, we reviewed a variety of sources of data to aid in our evaluation of whether there were additional practices, processes, or controls to consider. One of these sources of data was subsequent air toxics rules. Since the promulgation of the MACT standards for the source categories addressed in this proposal, EPA has developed air toxics regulations for a number of additional source categories. We reviewed the regulatory requirements and/or technical analyses associated with these subsequent regulatory actions to identify any practices, processes, and control technologies considered in these efforts that could possibly be applied to emission sources in the source categories under this current RTR review.

We also consulted EPA’s RBLC. The terms “RACT,” “BACT,” and “LAER” are acronyms for different program requirements under the CAA provisions addressing the national ambient air quality standards. Control technologies classified as RACT, BACT, or LAER apply to stationary sources depending on whether the source is existing or new, and on the size, age, and location of the facility. Best Available Control Technology and LAER (and sometimes RACT) are determined on a case-by-case basis, usually by state or local permitting agencies. EPA established the RBLC to provide a central database of air pollution technology information (including technologies required in source-specific permits) to promote the sharing of information among permitting agencies and to aid in identifying future possible control technology options that might apply broadly to numerous sources within a category or apply only on a source-by-source basis. The RBLC contains over 5,000 air pollution control permit determinations that can help identify appropriate technologies to mitigate many air pollutant emission streams. We searched this database to determine whether any practices, processes, or control technologies are included for the types of processes used for emission

sources (e.g., spray booths) in the source categories under consideration in this proposal.

We also requested information from industry regarding developments in practices, processes, or control technology. Finally, we reviewed other information sources, such as state or local permitting agency databases and industry-supported databases.

V. Analyses Results and Proposed Decisions

This section of the preamble provides background information on the MACT standards and source categories, the results of our RTR for each source category, and our proposed decisions concerning the SSM provisions in each MACT standard.

A. What are the results and proposed decisions for the Shipbuilding and Ship Repair (Surface Coating) source category?

1. Overview of the Source Category and MACT Standards

The National Emission Standards for Shipbuilding and Ship Repair (Surface Coating) were promulgated on December 15, 1995 (60 FR 64330) and codified at 40 CFR part 63, subpart II. The Shipbuilding and Ship Repair (Surface Coating) MACT standards (*i.e.*, Shipbuilding MACT standards) apply to shipbuilding and ship repair operations at any facility that is a major source of HAP. We estimate that there are approximately 85 shipbuilding and ship repair facilities currently subject to the Shipbuilding MACT standards.

The shipbuilding and ship repair industry consists of establishments that build, repair, repaint, convert, and alter ships, which are marine or fresh-water vessels used for military or commercial operations. In general, activities and processes involved in ship repair and new ship construction are relatively similar. Operations include fabrication of basic components from raw materials, welding components and parts together, painting and repainting, overhauls, ship conversions, and other alterations. Nearly all shipyards that construct new ships also perform ship repairs. The source category covered by this MACT standard only includes the surface coating operations that occur at these facilities during shipbuilding and ship repair.

Emissions of VOHAP from surface coating operations at shipbuilding and ship repair facilities result from the application of coatings and the use of cleaning solvents containing VOHAP during ship repair and shipbuilding operations. To reduce VOHAP

emissions, the Shipbuilding MACT standards limit the coatings that can be used to those with as-applied VOHAP content less than or equal to the applicable level specified in Table 2 to Subpart II of Part 63—Volatile Organic HAP Limits for Marine Coatings. This table contains as-applied VOHAP content limits of a variety of marine surface coatings categories, including a general use category and 22 specialty coatings categories. The Shipbuilding MACT standards also specify work practice standards that minimize evaporative emissions and spills from the handling, transfer, and storage of VOHAP-containing materials such as organic thinning solvents and paint wastes.

2. What data were used in our risk analyses?

We initially created a preliminary dataset for the source category using data in the 2002 NEI Final Inventory, Version 1 (made publicly available on February 26, 2006). We reviewed the NEI dataset and made changes where necessary to ensure that the proper facilities were included and that the proper processes were allocated to the Shipbuilding and Ship Repair (Surface Coating) source category. We also reviewed the emissions and other data to identify data anomalies that could affect risk estimates. On March 29, 2007, we published an ANPRM (72 FR 29287) for the express purpose of requesting comments and updates to this dataset, as well as to the datasets for the other source categories addressed in that ANPRM. Approximately 20 comments, received in response to the ANPRM, were reviewed and considered, and we made adjustments to the dataset where we concluded the comments supported such adjustment. Adjustments were also made to the dataset to reflect updates made to the data in the 2005 NEI and to remove emissions from the dataset that were from sources that are not part of the Shipbuilding and Ship Repair (Surface Coating) source category, as determined through further engineering review. Based on the data collection and review process, we developed model input files to be used in the risk analysis for 71 facilities. As mentioned previously, there are a total of approximately 85 facilities subject to the Shipbuilding MACT standards. Therefore, we developed model input files for about 84 percent of the total facilities.

Nevertheless, after the adjustments described above were made to the dataset, approximately 40 facilities included in our list of 85 facilities still had some missing or incomplete HAP

emissions data, based on NEI and EPA's Toxics Release Inventory searches. Thus, a HAP profile was developed to populate the Shipbuilding and Ship Repair (Surface Coating) dataset with representative data for these 40 facilities, using several assumptions and decisions. For more information see *Memoranda Documenting Changes to the RTR Dataset for the Shipbuilding and Ship Repair (Surface Coating) Source Category*, dated November 22, 2010, which includes the memorandum *Default Emissions Assumptions for Shipbuilding RTR Dataset*. For three facilities that provided VOC emissions data, but did not provide HAP emissions data, we speciated the VOC emissions into specific HAP emissions, making the worst-case assumption that all the VOC were HAP. The HAP profile we developed and applied to the VOC emissions for these three facilities was based on the top three solvents reported by the other facilities in the source category, which accounted for more than 90 percent of the total HAP emissions at those facilities. This HAP speciation profile was: Xylene (all isomers)—78 percent; ethyl benzene—15 percent; and toluene—7 percent.

There were also 44 facilities subject to the Shipbuilding MACT standards with no available emissions data, and we decided to assign them to one of two possible categories based on available information from company Web sites, operating permits, previous MACT project information, or similar facilities. The first category included 11 facilities that emitted greater than or equal to 25 TPY of total HAP. The second category included 33 facilities that emitted less than 25 TPY. Based on a small number of available operating permits and industry information collected for the original MACT rule, we determined which facilities belonged in each category. We then used the available emissions data reported for those facilities to calculate average total HAP emissions for each source type. The average HAP emissions level for facilities in the first category was estimated to be about 25 TPY, and the average HAP emissions level for facilities in the second category was estimated to be 7 TPY. Thus, the 11 facilities in the first category with no emissions data were assigned emissions of 25 tons total HAP per year, and 33 facilities in the second category with no emissions data were assigned emissions of 7 tons total HAP per year. The same default HAP solvent profile discussed above was used to speciate the HAP emissions for these facilities. For a more complete description of the default

assumptions used to populate the dataset, *see Default Emissions Assumptions for Shipbuilding RTR Dataset* memorandum, dated August 30, 2010, which is available in the docket for this action. These updated data were used to conduct the risk assessments and other analyses that form the basis for this proposed action.

Mixed xylenes and ethyl benzene account for the majority of the HAP emissions from the Shipbuilding and Ship Repair (Surface Coating) source category (approximately 855 TPY, or 90 percent of the total HAP emissions by mass). These estimates are based on actual reported emissions data. These facilities also reported relatively small emissions of 33 other HAP. For more detail, see the memorandum in the docket for this action describing the risk assessment inputs and models for the

Shipbuilding and Ship Repair (Surface Coating) source category.

We estimate that MACT-allowable emissions from this source category could be up to 2 times greater than the actual emissions for some types of coatings, based on information obtained for the highest usage coating categories at several major source facilities. However, we do not have facility-specific information for all facilities or all coatings, and we request comment on this estimate. For more detail about how this estimate of the ratio of actual to MACT-allowable emissions was derived, see the *Maximum Achievable Control Technology (MACT) Allowable Emission Estimates* memorandum, dated August 5, 2010, in the docket for this action describing the estimation of MACT-allowable emission levels and associated risks and impacts. For the “facility-wide” risk analysis, facility-

specific emissions data from the 2005 NEI were used.

3. What are the results of the risk assessments and analyses?

We conducted an inhalation risk assessment for the Shipbuilding and Ship Repair (Surface Coating) source category. We also conducted an assessment of facility-wide risk and performed a demographic analysis of population risks. Details of the risk assessments and analyses can be found in the residual risk documentation referenced in section IV.A of this preamble, which is available in the docket for this action.

a. Inhalation Risk Assessment Results

Table 3 provides an overall summary of the results of the inhalation risk assessment.

TABLE 3—SHIPBUILDING AND SHIP REPAIR (SURFACE COATING) INHALATION RISK ASSESSMENT RESULTS

Number of facilities ¹	Maximum individual cancer risk (in 1 million) ²		Estimated population at risk \geq 1-in-1 million	Estimated annual cancer incidence (cases per year)	Maximum chronic non-cancer TOSHI ³		Maximum off-site acute non-cancer HQ ⁴
	Actual emissions level	Allowable emissions level			Actual emissions level	Allowable emissions level	
85	10	20	4,000	0.003	0.5	1	HQ _{REL} = 0.1 glycol ethers.

¹ Number of facilities evaluated in the risk analysis.

² Estimated maximum individual excess lifetime cancer risk.

³ Maximum TOSHI. The target organ with the highest TOSHI for the Shipbuilding and Ship Repair (Surface Coating) source category is the reproductive system.

⁴ The maximum estimated acute exposure concentration was divided by available short-term dose-response values to develop an array of HQ values. HQ values shown use the lowest available acute dose-response value, which, in most cases, is the REL. See section IV.A of this preamble for explanation of acute dose-response values.

As shown in Table 3, the results of the inhalation risk assessment performed using actual emissions data indicate the maximum lifetime individual cancer risk could be as high as 10-in-1 million, due to ethyl benzene emissions; the maximum chronic non-cancer TOSHI value could be as high as 0.5, due to mixed xylenes emissions; and the maximum off-site acute HQ value could be as high as 0.1, based on the REL value for glycol ethers. The total estimated cancer incidence from these facilities based on actual emission levels

is 0.003 excess cancer cases per year, or 1 in every 333 years.

As explained above, our analysis of potential differences between actual emission levels and emissions allowable under the Shipbuilding MACT standards indicate that MACT-allowable emission levels may be up to 2 times greater than actual emission levels. Considering this difference, the risk results from the inhalation risk assessment indicate the maximum lifetime individual cancer risk could be as high as 20-in-1 million, and the maximum chronic non-cancer TOSHI

value could be as high as 1 at the MACT-allowable emissions level.

Facility-wide Risk Assessment Results

A facility-wide risk analysis was also conducted based on actual emissions levels. Table 4 displays the results of the facility-wide risk assessment. For detailed facility-specific results, see Table 2 of Appendix 6 of the “Draft Residual Risk Assessment for the Shipbuilding and Ship Repair (Surface Coating) Source Category in the docket for this rulemaking.

TABLE 4. SHIPBUILDING AND SHIP REPAIR (SURFACE COATING) FACILITY-WIDE RISK ASSESSMENT RESULTS

Number of facilities analyzed		85
Cancer Risk	Estimated maximum facility-wide individual cancer risk (in 1 million)	200
	Number of facilities with estimated facility-wide individual cancer risk of 100-in-1 million or more	4
	Number of facilities at which the shipbuilding and ship repair (surface coating) source category contributes 50 percent or more to the facility-wide individual cancer risks of 100-in-1 million or more.	0
	Number of facilities with facility-wide individual cancer risk of 1-in-1 million or more	41
	Number of facilities at which the shipbuilding and ship repair (surface coating) source category contributes 50 percent or more to the facility-wide individual cancer risk of 1-in-1 million or more.	15
Chronic Non-cancer Risk	Maximum facility-wide chronic non-cancer TOSHI	10
	Number of facilities with facility-wide maximum non-cancer TOSHI greater than 1	6

TABLE 4. SHIPBUILDING AND SHIP REPAIR (SURFACE COATING) FACILITY-WIDE RISK ASSESSMENT RESULTS—Continued

	Number of facilities at which the shipbuilding and ship repair (surface coating) source category contributes 50 percent or more to the facility-wide maximum non-cancer TOSHI of 1 or more.	0
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The maximum individual cancer risk from all HAP emissions at any facility that contains sources subject to the Shipbuilding MACT standards is estimated to be 200-in-1 million based on actual emissions. Of the 85 facilities included in this analysis, four have facility-wide maximum individual cancer risks of 100-in-1 million or greater. At these shipbuilding and ship repair facilities, surface coating operations account for about 1 percent of the total facility-wide risk. There are 41 facilities with facility-wide maximum individual cancer risks of 1-in-1 million or greater. Of these 41 facilities, 15 have shipbuilding and ship repair (surface coating) operations that contribute greater than 50 percent to the facility-wide risks. The facility-wide cancer risks at these 41 facilities, and at the four facilities with risks of 100-in-a million or more, are primarily driven by emissions of hexavalent chromium from welding and abrasive blasting operations. However, we note that there are uncertainties in the amount and form of chromium emitted from these facilities. For many of the facilities, the emissions inventory used for the risk assessment included estimates for the two main forms of chromium (*i.e.*, hexavalent and trivalent chromium). However, for other facilities, we only had estimates of total chromium

emitted. For those facilities, we applied a default assumption that 34 percent of the total chromium emissions were hexavalent and 66 percent were trivalent chromium,³² based on the best judgment of EPA. Chromium speciation profiles can be found on the EPA Technology Transfer Network Web site for emissions inventories³³ under the “Point Sources” section. Although, hexavalent chromium is toxic and is a known human carcinogen, trivalent chromium is less toxic and is currently “not classified as to its human carcinogenicity.” Therefore, the relative emissions of these two forms can have a significant effect on the cancer risk estimates. We request comment on the distribution of the default emissions assumptions for chromium emissions applied to the Shipbuilding and Ship Repair (Surface Coating) source category.

The facility-wide maximum individual chronic non-cancer TOSHI is estimated to be 10 based on actual emissions. Of the 85 facilities included in this analysis, 6 have facility-wide maximum chronic non-cancer TOSHI values greater than 1 (the facility-specific TOSHI values are 2,2,2,3,4, and 10). Of these 6 facilities, none had shipbuilding and ship repair (surface coating) operations that contributed greater than 50 percent to these facility-

wide risks. The chronic non-cancer risks at these 6 facilities are primarily driven by manganese emissions from welding and abrasive blasting operations.

Finally, as discussed previously, the welding and abrasive blasting operations that occur during shipbuilding and ship repair are sources of HAP at these major source facilities, and could involve different types of metals (welding) and minerals (abrasive blasting and welding). We therefore intend to list welding and blasting operations that occur at shipbuilding and ship repair facilities as a major source category under Section 112(c)(5) of the CAA. We request additional information on the HAP emitted by these activities. Once we have this information, we will be in a better position to identify the appropriate scope of the major source category to be listed.

c. Demographic Risk Analysis Results

The results of the demographic analyses performed to investigate the distribution of cancer risks at or above 1-in-1 million among the surrounding population are summarized in Table 5 below. These results, for various demographic groups, are based on actual emissions levels for the population living within 50 km of the facilities.

TABLE 5—SHIPBUILDING AND SHIP REPAIR DEMOGRAPHIC RISK ANALYSIS RESULTS

	Nationwide	Population with cancer risk greater than 1 in a million due to . . .	
		Source category HAP emissions	Facility-wide HAP emissions
Total population	285,000,000	4,000	392,000
Race by percent			
White	75	54	71
All Other Races	25	46	29
Race by percent			
White	75	54	71
African American	12	42	20
Native American	0.9	0.4	0.6
Other and Multiracial	12	4	8
Ethnicity by percent			
Hispanic	14	3	9
Non-Hispanic	86	97	91

³² <http://www.epa.gov/ttn/atw/nata/nettables.pdf>.

³³ <http://www.epa.gov/ttn/chief/net/2005inventory.html#inventorydata>.

TABLE 5—SHIPBUILDING AND SHIP REPAIR DEMOGRAPHIC RISK ANALYSIS RESULTS—Continued

	Nationwide	Population with cancer risk greater than 1 in a million due to . . .	
		Source category HAP emissions	Facility-wide HAP emissions
Income by percent			
Below poverty level	13	24	16
Above poverty level	87	76	84
Education by percent			
Over 25 and without high school diploma	13	15	13
Over 25 and with a high school diploma	87	85	87

The results of the Shipbuilding and Ship Repair (Surface Coating) source category demographic analysis indicate that there are approximately 4,000 people exposed to a cancer risk greater than 1-in-1 million due to emissions from the source category. Of this population, an estimated 46 percent can be classified as a minority (listed as “All Other Races” in the table above), including 42 percent in the “African American” demographic group. Of the 4,000 people with estimated cancer risks above 1-in-1 million from the source category, 24 percent are in the “Below Poverty” demographic group, and 15 percent are in the “Over 25 Without High School Diploma” demographic group, results which are 11 and two percentage points higher, respectively, than the respective percentages for these demographic groups across the United States. The percentages for the other demographic groups are lower than their respective nationwide percentages. The table also shows that there are approximately 392,000 people exposed to an estimated cancer risk greater than 1-in-1 million due to facility-wide emissions. Of this population, an estimated 29 percent can be classified as a minority, including 20 percent in the “African American” demographic group. Of the 392,000 with estimated cancer risk greater than 1-in-1 million from the source category, 16 percent are in the “Below Poverty” demographic group, a result which is three percentage points higher than the respective percentage for this demographic group across the United States. The percentages for the other demographic groups are equal to, or lower than their respective nationwide percentages.

4. What are our proposed decisions on risk acceptability and ample margin of safety?

a. Risk Acceptability

As noted in section III.B of this preamble, we weigh all health risk factors and measures in our risk acceptability determination, including cancer risks to the individual most exposed, risk estimation uncertainty, and other health information. For the Shipbuilding and Ship Repair (Surface Coating) source category, the risk analysis we performed indicates that the cancer risks to the individual most exposed could be as high as 10-in-1 million due to actual emissions and as high as 20-in-1 million due to MACT-allowable emissions. These risks are considerably less than 100-in-1 million, which is the presumptive limit of acceptability. The risk analysis also shows low cancer incidence (1 case in every 333 years), no potential for adverse environmental effects or human health multi-pathway effects, and that chronic and acute non-cancer health impacts are unlikely. While our additional analysis of facility-wide risks showed that there are four facilities with maximum facility-wide cancer risk of 100-in-1 million or greater and 6 facilities with a maximum chronic non-cancer TOSHI greater than 1 and less than or equal to 10, it also showed that shipbuilding and ship repair (surface coating) operations did not drive these risks. Our additional analysis of the demographics of the exposed population indicates that disparities in risks between demographic groups may exist; however, the number of people exposed to cancer risks of 1-in-1 million or greater due to emissions from the source category is relatively low (4,000). Considering these factors and the uncertainties discussed in section IV.A.7 of this preamble, we propose that the risks from the Shipbuilding and

Ship Repair (Surface Coating) source category are acceptable.

b. Ample Margin of Safety

Although we are proposing that the risks from the Shipbuilding and Ship Repair (Surface Coating) source category are acceptable, risk estimates for 4,000 individuals in the exposed population are above 1-in-1 million. Consequently, we considered whether the MACT standard provides an ample margin of safety. In this analysis, we investigated available emissions control options that might reduce the risk associated with emissions from the source category and considered this information along with all of the health risks and other health information considered in the risk acceptability determination.

One option we considered was to require the use of marine coatings with lower overall VOHAP content or lower toxicity VOHAP content. However, we have not identified any data regarding the availability, use, performance, and emissions associated with the use of any such marine coating. We are soliciting comment on the availability of such coatings and any issues related to the use and performance of those coatings.

We also considered requiring the enclosure of some or all of the coating operations and requiring emissions to be routed to a control device, such as a regenerative thermal oxidizer. However, because these facilities repair and repaint ships, as well as perform new construction painting operations, any enclosures would need to be large enough to accommodate the entire ship or a large portion (*i.e.*, half) of a ship at one time. We determined that this is not practicable or technically feasible in many cases, would not be cost-effective, and we are not aware of any facility using an enclosure of this size. Additional information on the feasibility and costs of controls is discussed in the Technology Review section (section 5) of this preamble and

in the memorandum *Cost Analyses for Add-on Controls for Surface Coating Operations at Shipbuilding and Ship Repair Facilities*, dated September 2, 2010, in the docket for this action.

In accordance with the approach established in the Benzene NESHAP, EPA weighed all health risk measures and information considered in the risk acceptability determination, along with the costs and economic impacts of emissions controls, technological feasibility, uncertainties, and other relevant factors, in making our ample margin of safety determination. Considering the health risk information, the uncertainty and lack of data associated with one potential risk reduction option identified, and the technological infeasibility of the other option identified, we propose that the existing MACT standards provide an ample margin of safety to protect public health. Thus, we are proposing to re-adopt the existing MACT standards to satisfy section 112(f) of the CAA.

While we are proposing that the emissions covered by the Shipbuilding MACT standards provide an ample margin of safety to protect public health, we are concerned about the estimated facility-wide risks identified through these screening analyses. As described previously, the estimated cancer risks are due to emissions of chromium compounds and are largely dependent on the estimates of the fraction of total chromium that is in the hexavalent form. Welding and abrasive blasting operations (which are not part of this source category) that occur during shipbuilding and ship repair are sources of HAP at these major source facilities, and could involve different types of metals (welding) and minerals (abrasive blasting and welding).

5. What are the results and proposed decisions from the technology review?

We evaluated developments in practices, processes, and control technologies potentially applicable to the Shipbuilding and Ship Repair (Surface Coating) source category. This included a search of the RBLC Clearinghouse, the California BACT Clearinghouse, the Internet, and correspondence with state agencies and industry. We found an advance in add-on control technology since the Shipbuilding and Ship Repair MACT standards were originally developed in 1995, and we have determined that there are more stringent VOC-based coating limits for certain marine coating categories for shipbuilding and ship repair facilities in some areas of California.

We identified an add-on control device, a concentrator/RTO, recently installed (2009) at one shipbuilding and ship repair facility in California. The control device consisted of rotary concentrators followed by RTOs on five large, custom-built spray booths to control volatile organic emissions from some of the coating operations. The system is capable of achieving 95 percent control efficiency for the VOHAP emissions captured by the spray booths (which are estimated to capture 90 percent of the VOHAP emissions). For this type of add-on control to be effective, a facility must perform regular or continuous modular (ship sections or components) coating operations, a process that is normally performed at large shipyards during new ship construction. Due to the size of the booths required to handle large ship modules, a facility would also require a large physical land space to build or retrofit the spray booths. Such spray booths must be located near the final ship assembly area (e.g., dry-dock or graving dock) to facilitate the logistics of moving the ship modules into place and attaching them to other modules. Large coating booths would not be effective at shipyards that perform repairs on finished vessels or during dockside coating, since only a small amount of the total coating could be applied in such spray booths.

Nationwide, based on recently awarded contracts for new ship construction, we estimate that fewer than 20 facilities have significant new ship construction business, are large enough to adopt this type of technology, and are able to retrofit existing spray booths. We estimate cost-effectiveness of the concentrator/RTO system to be \$305,000 per ton of VOHAP, with an estimated industry-wide emission reduction of 48 tons of VOHAP per year (if installed at the approximately 20 facilities large enough to use the technology). Based on facility level sales, we determined that this option is not affordable. The cost as a percent of revenues was estimated to be 42 percent or greater. Additional information on the affordability of controls is discussed in the memorandum *Affordability of Add-on Controls for Surface Coating Operations at Shipbuilding and Ship Repair Facilities*, dated October 28, 2010, in the docket for this action. The large add-on controls also require a substantial amount of fuel, which produces NO_x emissions, a byproduct of combustion. The extra fuel use and emissions of NO_x would be negative consequences of the use of such add-on controls. Moreover, we believe the costs

of these controls would be disproportionate to the emission reduction that would be achieved. Thus, we are proposing that it is not necessary to revise the existing MACT standards to require this technology pursuant to section 112(d)(6) of the CAA.

In our review of developments in practices, processes, and control technologies, we also identified four California air quality districts that have adopted more stringent VOC marine coating emission limits than those specified in the 1995 Shipbuilding and Ship Repair (Surface Coating) MACT Standard. Based on information from major source facilities, when the Shipbuilding and Ship Repair MACT standards were originally developed, the relationship between VOC content and VOHAP content in marine coatings was approximately 3:1, where approximately 30 percent of all solvents used for painting and thinning were VOHAP solvents. For more information on the relationship between VOC and VOHAP, see the *Background Information Document for the Shipbuilding and Ship Repair (Surface Coating) proposed rule*, dated February, 1994. However, we note that the California limits are not uniformly applied across each coating category or in each of the four districts. Furthermore, the 1995 MACT standard includes cold weather VOHAP limits such that, if the temperature is below 4.5 °C (40 °F) at the time the coating is applied and the source needs to thin that coating beyond the applicable VOHAP limit, the applicable cold-weather VOHAP limit may be used. Since the California limits do not have similar allowances for cold weather, and California generally has a more temperate climate than many parts of the country, the ability to apply coatings effectively could be compromised in areas of the country with colder climates if the more stringent California limits were required nationwide. We currently do not have data to determine whether these lower-VOC content coatings could be applied nationwide. Considering the technical feasibility uncertainties associated with the use of lower-VOHAP coatings, we are proposing that it is not necessary to revise the existing MACT standards to require lower-VOHAP coatings pursuant to section 112(d)(6) of the CAA. However, we solicit comment and data on low-VOHAP marine coatings that may be available for use at these facilities and that could be applied at facilities nationwide.

6. What other actions are we proposing?

We are proposing the elimination of the SSM exemption in the Shipbuilding (Surface Coating) MACT Standards. Consistent with *Sierra Club v. EPA*, EPA is proposing standards in this rule that apply at all times. We are proposing several revisions to subpart II. Specifically, we are proposing to revise Table 1 to Subpart II of Part 63—General Provisions of Applicability to Subpart II to indicate that the requirements of 40 CFR 63.6(e)(1)(i) of the *General Provisions* do not apply, including at facilities complying with the standards by using an add-on control device. The 40 CFR 63.6(e)(1)(i) requires owners or operators to act according to the general duty to “operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions.” We are separately proposing to incorporate this general duty to minimize into 40 CFR 63.783(b)(1). The 40 CFR 63.6(e)(3) requires the owner or operator of an affected source to develop a written SSM plan. We are proposing to remove the SSM plan requirement. We are also proposing to: (1) Add 40 CFR 63.786(e) to specify the conditions for performance tests; (2) revise the SSM-associated reporting and recordkeeping requirements in 40 CFR 63.788 to require reporting and recordkeeping for periods of malfunction; (3) revise Table 1 to Subpart II of Part 63—General Provisions of Applicability to Subpart II to specify that 40 CFR 63.6(e)(1)(i) and (ii), 63.6(e)(3), 63.6(f)(1); 40 CFR 63.7(e)(1), 40 CFR 63.8(c)(1)(i) and (iii), and the last sentence of 63.8(d)(3); 40 CFR 63.10(b)(2)(i),(ii), (iv), and (v); 40 CFR 63.10(c)(10), (11), and (15); and, 40 CFR 63.10(d)(5) of the *General Provisions* do not apply. In addition, as explained above, we are proposing to add an affirmative defense to civil penalties for exceedances of emission limits caused by malfunctions, as well as criteria for establishing the affirmative defense.

EPA has attempted to ensure that we have neither overlooked nor failed to propose to remove from the existing text any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption, nor included any such provisions in the proposed new regulatory language. We are specifically seeking comment on whether there are any such provisions that we have inadvertently overlooked or incorporated.

Finally, we intend to list welding and blasting operations that occur at shipbuilding and ship repair facilities as a major source category under section 112(c)(5) of the CAA and are requesting additional information on the HAP emitted by these activities. Once we have this information, we will be in a better position to identify the appropriate scope of the major source category to be listed.

B. What are the results and proposed decisions for the Wood Furniture Manufacturing Operations source category?

1. Overview of the Source Category and MACT Standard

The National Emission Standards for Wood Furniture Manufacturing Operations were promulgated on December 7, 1995 (60 FR 62930) and codified at 40 CFR part 63, subpart JJ. The Wood Furniture Manufacturing Operations MACT standards (*i.e.*, Wood Furniture MACT standards) apply to wood furniture manufacturing operations at any facility that is a major source of HAP. We estimate that there are approximately 406 wood furniture manufacturing facilities subject to the Wood Furniture Manufacturing Operations MACT standards. In some instances, wood furniture manufacturing operations may be located at facilities that also have operations regulated by the NESHAP for Surface Coating of Metal Furniture (40 CFR part 63, subpart RRRR), the NESHAP for Surface Coating of Wood Building Products (40 CFR part 63, subpart QQQQ), or NESHAP for Plywood and Composite Wood Products (Subpart DDDD).

The Wood Furniture Manufacturing Operations source category includes operations related to the production of a range of wood products, including wood kitchen cabinets, wood residential furniture, upholstered residential and office furniture, wood office furniture and fixtures, partitions, shelving, lockers, and other wood furniture not included in one of the other categories listed above.

Finishing, gluing, cleaning, and wash-off operations are processes that take place during wood furniture manufacturing that result in VHAP emissions, and are regulated by the Wood Furniture Manufacturing Operations MACT standards.

Finishing materials include, but are not limited, to stains, basecoats, washcoats, sealers, enamels, and topcoats. All of these finishing materials may contain VHAP that would be emitted during application. After a

finishing material is applied, the wood substrate typically enters a flash-off area where the more volatile solvents in the finishing materials (including VHAP) evaporate, and the finishing material begins to cure. Then, the wood substrate enters an oven where curing of the finishing material and evaporation of the volatile solvents continues.

The only gluing operations that occur at wood furniture manufacturing facilities that are part of the Wood Furniture Manufacturing Operations source category are contact adhesives.

Cleaning activities include the use of solvents to dissolve resins into the coating mix and to remove dried coatings. These industrial solvents sometimes contain VHAP which evaporate when the solvent is exposed to the air and subsequently discharged to the atmosphere via ventilation air.

To meet the requirements of the Wood Furniture MACT Standards, facilities typically use compliant coatings, finishing materials that meet the individual VHAP content requirements by material type, and work practice standards. Work practice standards include inspection and maintenance plans to prevent leaks, as well as using covers on tanks.

Another option, installing destructive control devices such as thermal oxidizers, is allowed by the Wood Furniture MACT standards as an alternative to using compliant coatings, but is not often used by the industry. For more information see memorandum *Developments in Practices, Processes, and Control Technologies for the Wood Furniture Manufacturing Operations*, dated August 24, 2010.

2. What data were used in our risk analyses?

For the Wood Furniture Manufacturing Operations source category, we compiled preliminary datasets using data in the 2005 NEI. We reviewed and verified these data and made changes where necessary. In this review and verification process, we contacted several facilities to verify existing information on emissions of several different pollutants, including speciated glycol ether emissions, as reported in the NEI. We obtained updated emissions data and process information (generally 2008 or 2009 data), found that some plants had closed, and that others no longer manufacture wood furniture. For more detail, see the memorandum *Wood Furniture Manufacturing—Updated Data for Modeling File*, dated June 8, 2010, in the docket for this action.

In addition to contacting individual facilities, we consulted with four trade

associations that are heavily involved in wood furniture manufacturing operations. We asked KCMA, the AHFA, the BIFMA, and the ACA to verify existing information in the NEI database. Specifically, we asked the trade associations to verify addresses, operational status (*i.e.*, operational or shut down), and whether the facilities belonged in the Wood Furniture Manufacturing source category. With their assistance, we were able to update the facility status for another 85 facilities. For more detail, see the memo *Review and Verification of Wood Furniture Facilities in NEI Database*, dated October 22, 2010, in the docket for this action.

A speciation profile was created and applied to the generically-reported glycol ethers in the NEI data set. A total of 66 wood furniture manufacturing facilities in the RTR dataset reported generic glycol ethers that totaled 70 TPY. For more information about glycol ethers and the glycol ether speciation profile, see the memorandum *Review of Glycol Ether Emissions Associated with Wood Furniture Manufacturing Source*

Category, dated October 22, 2010, in the docket for this action.

This updated dataset was used to conduct the risk assessments and other analyses that form the basis for this proposed action. Toluene and mixed xylenes account for the majority of the VHAP emissions from the Wood Furniture Manufacturing Operations source category (approximately 3,500 TPY and 62 percent of the total VHAP emissions by mass). Lower levels of emissions of 68 other VHAP were also reported from facilities in the source category. For more detail, see the memorandum *Wood Furniture Manufacturing—Updates for Modeling File*, dated June 8, 2010, in the docket for this action describing the risk assessment inputs and models for the Wood Furniture Manufacturing Operations source category.

We estimate that MACT-allowable emissions from this source category could be up to 2 times greater than the actual emissions, as the compliant coatings used typically have lower VHAP content than required by the Wood Furniture Manufacturing Standards to allow for operational and market variability. However, we do not

have facility-specific information for all facilities or all coatings, and we request comment on this estimate. For more detail about how we estimated this ratio of actual-to-MACT-allowable emissions, see the memorandum *Maximum Achievable Control Technology (MACT) Allowable Emission Estimates*, dated September 9, 2010, in the docket for this action.

3. What are the results of the risk assessments and analyses?

We have conducted an inhalation risk assessment for the Wood Furniture Manufacturing Operations source category. We have also conducted an assessment of facility-wide risks and performed a demographic analysis of population risks. Details of the risk assessments and analyses can be found in the residual risk documentation referenced in section IV.A of this preamble, which is available in the docket for this action.

a. Inhalation Risk Assessment Results

Table 6 provides an overall summary of the inhalation risk assessment results for the source category.

TABLE 6—WOOD FURNITURE MANUFACTURING OPERATIONS INHALATION RISK ASSESSMENT RESULTS

Number of facilities ¹	Maximum individual cancer risk (in 1 million) ²		Estimated population at risk \geq 1-in-1 million	Estimated annual cancer incidence (cases per year)	Maximum chronic non-cancer TOSHI ³		Maximum off-site acute non-cancer HQ ⁴
	Actual emissions level	Allowable emissions level			Actual emissions level	Allowable emissions level	
385	20	40	20,000	0.005	0.4	0.8	HQ _{REL} = 10 (propyl cellosolve) ⁵ HQ _{REL} = 7 (formaldehyde) HQ _{AEG-1} = 0.35 (formaldehyde) HQ _{REL} = 2 (toluene) HQ _{ERPG-1} = 0.35 (toluene) HQ _{AEG-1} = 0.09 (toluene)

¹ Number of facilities evaluated in the risk analysis.

² Estimated maximum individual excess lifetime cancer risk. We note that the MIR values would be reduced by 50 percent, and the cancer incidence would be reduced by 30 percent if the CIIT URE for formaldehyde were used instead of the IRIS URE.

³ Maximum TOSHI. The target organ with the highest TOSHI for the Wood Furniture Manufacturing Operations source category is the nervous system.

⁴ The maximum estimated acute exposure concentration was divided by available short-term dose-response values to develop an array of HQ values. HQ values shown use the lowest available acute dose-response value, which in most cases is the REL. Note that the REL for EGME was used to evaluate propyl cellosolve. When HQ values exceed 1, we also show HQ values using the next lowest available acute dose-response value. See section IV.A of this preamble for explanation of acute dose-response values.

⁵ Note the HQ value for propyl cellosolve is the maximum acute pollutant HQ of all speciated glycol ethers modeled. The REL for EGME was used to evaluate propyl cellosolve and all speciated glycol ethers that do not have an acute dose response value. There are no AEGL or ERPG values available for glycol ethers to aid in further interpretation of potential acute risks.

The inhalation risk modeling was performed using actual emissions data. As shown in Table 6, the results of the inhalation risk assessment indicate the maximum lifetime individual cancer risk could be as high as 20-in-1 million

due to emissions of formaldehyde.³⁴ The total estimated cancer incidence due to actual emissions from the source category is 0.005 excess cancer cases per year, or one case in every 200 years. The maximum chronic non-cancer TOSHI

value could be up to 0.4, due to emissions of hexane; and the maximum acute HQ value could be up to 10 for propyl cellosolve with propyl cellosolve representing the maximum acute HQ among all the speciated glycol ethers using the REL value for EGME as a surrogate. We estimate that emissions of glycol ethers (mainly propyl cellosolve)

³⁴ We note that this MIR value would be reduced by 50 percent if the CIIT URE for formaldehyde were used instead of the IRIS URE.

from eight facilities (or about two percent of the total facilities) result in maximum acute HQs greater than 1. Additionally, the maximum acute HQ for formaldehyde could be up to 7 based on the REL value for formaldehyde. We estimate that emissions of formaldehyde from 11 facilities (about three percent of the total facilities) result in maximum acute HQs between 1 and 7 (the actual maximum HQ values for these 11 facilities are 7, 7, 6, 6, 2, 2, 2, 2, 2, 2, and 2). The maximum acute level of formaldehyde did not exceed the one hour AEGL-1 for formaldehyde; the estimated maximum HQ using the AEGL-1 was 0.35. We also identified one facility with a potential to exceed the acute REL for toluene (with a maximum estimated acute HQ_{REL} of 2, a maximum estimated acute HQ_{AEGL-1} of 0.09, and a maximum estimated acute HQ_{ERPG-1} of 0.35.). It is important to note, as described earlier in this preamble, the acute assessment includes multiple conservative assumptions. For example, the modeling approach assumes that peak emissions occur at the same time as worst case one hour meteorology and that a person is located directly downwind at that time. Moreover, for glycol ethers, we used the lowest acute REL of any of the glycol ethers with such health values (*i.e.*, EGME) to assess the other glycol ethers without such values. There are no AEGL or ERPG values available for any glycol ethers; this limits our ability to further interpret the potential acute impacts of propyl cellosolve. Nonetheless, overall, we believe it is unlikely that HAP emissions from this source category pose significant acute health risks. Nevertheless, we are seeking comments and data to refine the risk assessment and resolve the uncertainties that led to the use of conservative assumptions. Some of the specific information and data that we are seeking are described below.

As explained above, our analysis of potential differences between actual emission levels and emissions allowable under the MACT standards indicates that MACT-allowable emission levels may be up to 2 times greater than actual emission levels. Considering this difference, the risk results from the inhalation risk assessment indicate the maximum lifetime individual cancer risk could be as high as 40-in-1 million, and the maximum chronic non-cancer TOSHI value could be up to 0.8 at the MACT-allowable emissions level.

The risk assessment for chronic non-cancer risks was performed consistent with the approach taken in previous risk and technology review for other source categories, *i.e.*, we used our existing

hierarchy of reference values (EPA 1999—Residual Risk Report to Congress), which favors the use of an IRIS value when available, and favors using values which have been developed and peer-reviewed using processes similar to the IRIS process under the sponsorship of a state or federal government agency, the documentation of which can be easily accessed by the public (such as those from ATSDR or the California EPA) when IRIS values are not available. The use of a surrogate reference value for chemicals in a chemical group (*e.g.*, glycol ethers) is part of this approach when specific chemicals in the group do not have available reference values, and/or emissions are reported generically for the chemical group and not specific chemicals. In this case, the IRIS RfC for EGME is the lowest (*i.e.*, most health protective) of the available reference values for glycol ethers from our hierarchy of reference values. Using the surrogate approach described above, the maximum chronic non-cancer TOSHI for the source category could be as high as 0.4 (based on actual emissions) and 0.8 (based on allowable emissions), with emissions of n-hexane dominating.

In reviewing data sources for this residual risk assessment, we identified a PPRTV for assessing chronic noncancer health risks from inhalation of DGBE, which is emitted by some facilities in this source category. PPRTV are reference values, developed by EPA for use specifically in EPA's Superfund Program when an acceptable reference value, such as those found in EPA's IRIS database, is not otherwise available.

The DGBE PPRTV was prepared for EPA's Superfund Program in 2009. Inhalation toxicity information for DGBE is essentially limited to the results of a single 5-week study in rats (Gushow *et al.*, 1984), which resulted in slight vacuolization of the liver cells consistent with fatty change. An uncertainty factor of 3000 was applied in deriving the PPRTV, and confidence in the provisional RfC (p-RfC) value is low.

Provisional Peer Reviewed Toxicity Values differ from IRIS values in that PPRTVs do not receive the multiprogram review provided for IRIS values. As stated in the DGBE PPRTV document, this is because “* * * IRIS values are generally intended to be used in all U.S. EPA programs, while PPRTVs are developed specifically for the Superfund Program.” The EPA's Superfund Program uses PPRTVs in conjunction with assessments to support site-specific clean-up decisions. PPRTVs are applied to high quality

exposure data developed for each Superfund site using measurements of the specific chemical for which the PPRTV was developed. Each final cleanup decision, as memorialized in a Record of Decision, is subject to public notice and comment, and it is at this stage of the process that a public review of how a PPRTV was used in that site-specific context may occur, which may include consideration of comments on the development of the PPRTV itself (*i.e.*, the PPRTV development document is not explicitly the subject of a separate public review or comment period). The current process for development of the reference values used to support these proposed decisions includes a public comment period prior to a final external peer review of the assessment. This more rigorous review process prior to the release of the values enables immediate use of the derived values across multiple EPA Program Offices, including providing support for national regulatory decisions (*e.g.*, RTR).

Contrasting the site-specific Superfund application of PPRTVs and related Records of Decision, the Wood Furniture RTR proposal is of national scope and will not be subject to ongoing review related to each application to a facility. Based on the foregoing discussion, EPA has determined that reliance on the DGBE PPRTV value in this RTR rule is beyond the specific purpose for which it was developed, and would exacerbate the cumulative uncertainty in the baseline Wood Furniture risk assessment stemming from limitations in the underlying exposure and toxicity data. Accordingly, EPA has not used the DGBE PPRTV value in the risk assessment supporting this proposed action, noting that a suitable alternative value (in this case, it is the RfC for EGME from IRIS) is available to represent the toxicity of glycol ethers without hierarchically based non-cancer reference values in the assessment.

In characterizing the potential cancer and non-cancer risks, it is important to consider the uncertainties related to the risk assessments, particularly for formaldehyde and glycol ethers. Some of the general uncertainties with health values and the modeling approach were described earlier in this preamble. With regard to emissions, there are various areas of potential uncertainty for these HAP. First, only about 23 percent of the facilities reported glycol ether emissions and about half reported formaldehyde. We recognize that not all facilities necessarily emit these HAP. Nevertheless, we believe the actual number of facilities with emissions of glycol ethers and formaldehyde could

possibly be higher than the number we have in our data set because of the uncertainties in the NEI database, including the lack of quantified emissions from curing and gluing. Second, most facilities reporting glycol ether emissions reported them generically as the class “glycol ethers” and not as particular species. We developed a profile to speciate these generic glycol ethers, which was generated from a composite of reported speciated glycol ethers emissions data from facilities across the source category; however, there is uncertainty regarding how representative this profile is for the other facilities in the source category since the profile is based on limited data. Additionally, as previously discussed, a limited number of the glycol ether compounds have non-cancer reference values and therefore a surrogate value was used. For the acute assessment, glycol ethers were assessed individually and not as a combined group. Third, the reported levels of formaldehyde in the NEI are likely derived from coatings and contact adhesives content and may not account for curing or other types of gluing operations that may create and emit VHAP (including formaldehyde). Recognizing that there is no approved method for estimating formaldehyde emissions from curing, this is an

uncertainty that could possibly bias the risk estimates low, but the extent of underestimation, if any, is unknown.

With regard to the acute inhalation assessment, the maximum acute non-cancer HQs of 7 for formaldehyde with the REL and 0.35 with the AEGL and 10 for propyl cellosolve were derived partly based on using an acute multiplier of 4 from the annual average hourly emissions. The factor of 4 is based on readily available information for the emissions driving the risk. The information we have may not be representative of all sources in the category. For more information on this factor, see the memorandum *Acute Effects Factor for Wood Furniture Manufacturing Operations*, dated November 23, 2010, in the docket for this action.

Thus, because of the uncertainties described above, we solicit additional data and comments that would improve our emissions estimates. Specifically, we solicit data on glycol ethers (speciated to the extent known) and formaldehyde used in coatings at wood furniture manufacturing facilities. We solicit data regarding facilities that use coatings that may form formaldehyde or other VHAP during the curing process and data on VHAP emissions related to gluing operations. We solicit comment on the emissions estimates and

assumptions we have used in this proposal and whether there are scientifically credible methods to estimate curing and gluing emissions, based on known coatings or other methods. We also solicit comment on potential options for reducing the use in this source category of specific glycol ethers which are known to have (or are suspected to have) higher toxicity than other compounds in the class. Moreover, we request that comments include, if possible, the following types of data and information that might help reduce the uncertainties: (1) Ranges of the VHAP content in coating products and variability between product runs for different types of facilities; (2) ranges within the annual averages of VHAP per pound of coating solids; (3) information regarding whether control devices are used and, if so, what types and at how many facilities.

b. Facility-wide Risk Assessment Results

Table 7 displays the results of the facility-wide risk assessment. This assessment was conducted based on actual emission levels. For detailed facility-specific results, see Table 2 of Appendix 6 of the “Draft Residual Risk Assessment for the Wood Furniture Manufacturing Source Category” in the docket for this rulemaking.

TABLE 7—WOOD FURNITURE MANUFACTURING OPERATIONS FACILITY-WIDE RISK ASSESSMENT RESULTS

Number of facilities analyzed		385
Cancer Risk	Estimated maximum facility-wide individual cancer risk (in 1 million)	100
	Number of facilities with estimated facility-wide individual cancer risks of 100-in-1 million or more	1
	Number of wood furniture manufacturing operations contributing 50 percent or more to facility-wide individual cancer risk of 100-in-1 million or more.	0
	Number of facilities with facility-wide individual cancer risk of 1-in-1 million or more	74
	Number of wood furniture manufacturing operations contributing 50 percent or more to facility-wide individual cancer risk of 1-in-1 million or more.	64
Chronic Non-cancer Risk	Maximum facility-wide chronic non-cancer TOSHI	3
	Number of facilities with facility-wide maximum non-cancer TOSHI greater than 1	2
	Number of wood furniture manufacturing operations contributing 50 percent or more to facility-wide maximum non-cancer TOSHI of 1 or more.	0

The maximum individual cancer risk from all HAP emissions at a facility that contains sources subject to the Wood Furniture Manufacturing MACT standards is estimated to be 100-in-1 million. Of the 385 facilities included in this analysis, one has a facility-wide maximum individual cancer risk of 100-in-1 million or greater. At this facility, the wood furniture manufacturing operations contribute approximately one percent to these facility-wide risks. Based on the data we have, the emissions source driving this higher cancer risk is a boiler, which is subject to the proposed Boiler NESHAP (see 75

FR 32006, June 4, 2010) which is scheduled to be finalized in the near future.

There are 74 facilities with facility-wide maximum individual cancer risks of 1-in-1 million or greater. Of these 74 facilities, 64 have wood furniture manufacturing operations that contribute 50 percent or greater to the facility-wide risks. The facility-wide cancer risks at most of these 74 facilities are primarily driven by emissions of ethyl benzene from wood furniture manufacturing operations.

The facility-wide maximum individual chronic non-cancer TOSHI is

estimated to be 3. Of the 385 facilities included in this analysis, two have facility-wide maximum chronic non-cancer TOSHI values between 1 and 3 (the individual TOSHI values are 2 and 3); all the rest are 1 or below. Of these three facilities, no facility had wood furniture manufacturing operations that contributed 50 percent or greater to these facility-wide risks. The chronic non-cancer risks at these facilities are primarily driven by emissions of manganese and acrolein from boilers.

c. Demographic Risk Analysis Results

The results of the demographic analyses performed to investigate the

distribution of cancer risks at or above 1-in-1 million to the surrounding population are summarized in Table 8 below. These results, for various

demographic groups, are based on actual emissions levels for the population living within 50 km of the facilities.

TABLE 8—WOOD FURNITURE MANUFACTURING OPERATIONS DEMOGRAPHIC RISK ANALYSIS RESULTS

	Nationwide	Population with cancer risk greater than 1 in a million due to	
		Source category HAP emissions	Facility-wide HAP emissions
Total population	285,000,000	20,000	26,000
Race by percent			
White	75	63	65
All Other Races	25	37	35
Race by percent			
White	75	63	65
African American	12	13	17
Native American	0.9	0.7	0.6
Other and Multiracial	12	23	17
Ethnicity by percent			
Hispanic	14	34	24
Non-Hispanic	86	66	76
Income by percent			
Below poverty	13	16	16
Above poverty	87	84	84
Education by percent			
Over 25 and without high school diploma	13	19	19
Over 25 and with a high school diploma	87	81	81

The results of the Wood Furniture Manufacturing Operations source category demographic analysis indicate that there are 20,000 people exposed to a cancer risk greater than or equal to 1-in-1 million based on HAP emissions from the source category. Of this population, an estimated 37 percent can be classified as a minority (listed as “All Other Races” in the table above), including 13 percent in the “African American” demographic group, and 23 percent in the “Other and Multiracial” demographic group). Of the 20,000 people with estimated cancer risks above 1-in-1-million from the source category, 34 percent are in the “Hispanic” demographic group, 16 percent are in the “Below Poverty” demographic group, and 19 percent are in the “Over 25 and Without High School Diploma” demographic group; these percentages are higher than their respective percentages for these demographic groups across the United States by 20, 3, and 6 percentage points. The percentages for the other demographic groups are lower than their respective nationwide values. The

table also shows that there are approximately 26,000 people exposed to an estimated cancer risk greater than or equal to 1-in-1 million based on facility-wide emissions. Of this population, the results of the facility-wide demographic analysis indicate that the percentages are higher than nationwide percentages for those included in the “African American,” “Other and Multiracial,” “Hispanic,” “Below Poverty” level,” and the “Over 25 and Without High School Diploma” demographic groups, by 5, 5, 10, 3, and 6 percentage points, respectively. The percentages for the other demographic groups are lower than their respective nationwide values.

4. What are our proposed decisions on risk acceptability and ample margin of safety?

a. Risk Acceptability

As noted in section III.B of this preamble, we weigh all health risk factors and measures in our risk acceptability determination, including cancer risks to the individual most exposed, risk estimation uncertainty, and other health information. For the

Wood Furniture Manufacturing Operations source category, the risk analysis we performed indicates that the cancer risks to the individual most exposed could be up to 20-in-1 million due to actual emissions and up to 40-in-1 million due to MACT-allowable emissions.³⁵ These values are considerably less than 100-in-1 million, which is the presumptive limit of acceptability. The risk analysis also shows low cancer incidence (1 in every 200 years),³⁶ no potential for adverse environmental effects or human health multi-pathway effects, and that chronic non-cancer health impacts are unlikely.

When estimated maximum 1-hour peak emissions estimates for speciated glycol ethers (*i.e.*, propyl cellosolve) are compared to the REL for EGME (used as a surrogate for propyl cellosolve), the assessment indicates that a maximum acute non-cancer HQ up to 10 could occur at one facility. Eight facilities (or

³⁵ We note that these MIR values would be reduced by 50 percent if the CIIT URE for formaldehyde were used instead of the IRIS URE.

³⁶ We note that the cancer incidence would be reduced by 30 percent if the CIIT URE for formaldehyde were used instead of the IRIS URE.

2 percent of the total) had an estimated HQ greater than 1. All other facilities modeled had HQ less than 1.

Nevertheless, exposures above the REL do not necessarily indicate that adverse effects will occur. There are no other appropriate acute reference values available for glycol ethers that may be used to assess acute risks for glycol ethers.

When estimated one-hour peak emissions estimates for formaldehyde are compared to the formaldehyde REL, the assessment indicates a maximum acute non-cancer HQ up to 7 could occur. Eleven facilities (or three percent of the total) had an estimated HQ greater than 1 and up to 7 for formaldehyde. All other facilities modeled had HQs less than 1. The maximum acute HQ for formaldehyde based on an AEGL-1 or ERPG-1 value is 0.35. Exposures immediately above the REL do not necessarily indicate that adverse effects will occur (*i.e.*, they do not define a threshold for an effect); on the other hand, AEGL-1 and ERPG-1 are levels above which you may have mild, but reversible, non-disabling effects.

A detailed discussion of our acute assessment for formaldehyde along with the interpretation of potential acute risks is provided in the *Draft Risk Assessment for the Wood Furniture Manufacturing Source Category*, in the docket for this rulemaking. We solicit comment on the acute assessment and on the interpretation of potential acute formaldehyde risks.

Nevertheless, as described earlier in this preamble, the acute assessment includes some conservative assumptions and some uncertainties. Moreover, the RELs are protective and designed to protect the most sensitive individuals in the population by inclusion of margins of safety. Therefore, overall we believe that it is unlikely that HAP emissions from this

source category pose unacceptable acute non-cancer risks. However, as described below, we still have concerns about the uncertainties associated with acute non-cancer risks.

While our additional analysis of facility-wide risks indicates that there is one facility with a maximum facility-wide cancer risk of 100-in-1 million and three facilities with a maximum chronic non-cancer TOSHI of 1 or more, it also shows that wood furniture manufacturing operations do not drive these risks. Our additional analysis of the demographics of the exposed population indicates disparities in risks between demographic groups may exist; however, the overall risks are not high and the total number of people exposed to cancer risks of 1-in-1 million or greater due to emissions from the source category is relatively low (20,000).

EPA has weighed the various health measures and factors and uncertainties discussed above and in section IV.A.7 of this preamble, and is proposing that the risks from the Wood Furniture Manufacturing Operations source category are acceptable. We are proposing that the risks are acceptable after weighing concerns about possible acute non-cancer risks, especially acute non-cancer risks due to formaldehyde (acute HQ up to 7 with the REL and up to 0.35 with the AEGL) and glycol ethers (acute HQ up to 10), and uncertainties in the emissions data as described above. We have considered these HAP further under the ample margin of safety analyses, as described below, and are seeking data and comments to help us refine the assessments.

b. Ample Margin of Safety

Although we are proposing that the risks from the Wood Furniture Manufacturing Operations source category are acceptable, risk estimates for 20,000 individuals in the exposed population are above 1-in-1 million, and

while there is uncertainty associated with our assessment of acute non-cancer risks, we remain concerned about the potential for them. Consequently, we considered whether the Wood Furniture MACT standards provide an ample margin of safety. In this analysis, we investigated available emissions control options that might reduce the risks associated with emissions from the Wood Furniture Manufacturing Operations source category and considered this information along with all of the health risks and other health information considered in the risk acceptability determination.

i. Emissions Control Options

We evaluated the emissions reductions and cost associated with various control options for the Wood Furniture Manufacturing Operations source category. One option would require lower VHAP content in wood furniture coatings, which we estimate could reduce VHAP emissions from this source category by up to 56 TPY from the estimated baseline level of 5,900 TPY.³⁷ The estimated capital and annualized costs for this option would be \$12,200,000 and \$2,800,000, respectively. We estimate the cost-effectiveness would be about \$30,000 per ton of HAP emissions reduced. We estimate this requirement to lower VHAP content from wood furniture coatings would not appreciably reduce the maximum lifetime individual cancer risk, the maximum chronic non-cancer TOSHI value, or the maximum acute non-cancer TOSHI value. These values would remain at about 20-in-1 million for the maximum lifetime individual cancer risk, 0.4 for the maximum chronic non-cancer TOSHI value, and 10 for the maximum acute HQ value using the REL.³⁸ Table 9 summarizes the nationwide costs and cost-effectiveness of this option.

TABLE 9—LOWER VOC COATING LIMITS FOR WOOD FURNITURE MANUFACTURING OPERATIONS—COSTS AND RISK REDUCTIONS

Control option	Number of affected facilities	Emission reduction (TPY)	Capital costs (\$ million)	Annualized costs (\$ million/yr)	Cost-effectiveness (\$/ton)	Max MIR after control (in 1 million)	Max TOSHI after control	Max Acute HQ after control
Lower VOC coating limits	406	56	\$12.2	\$2.8	\$30,000	20	0.4	10

³⁷ We estimate that lower-VHAP coatings could be applied nationwide for the Wood Furniture Manufacturing Operations source category because the coatings are applied inside buildings at the facilities and the external temperature is not a limiting factor.

³⁸ We estimate this requirement to lower VHAP content from wood furniture coatings would reduce the maximum lifetime individual cancer risk and the maximum chronic non-cancer TOSHI value by approximately one percent. However, as the maximum individual risk values are presented with

one significant digit due to the precision of the data used to estimate these values, the risk values would still be presented as 20 for the maximum individual cancer risk, 0.4 for the maximum individual non-cancer TOSHI, and 10 for the maximum acute HQ value.

Another potential emissions reduction option involving an RTO add-on control device was investigated but found not to be feasible for implementation by the majority of the facilities in the source category. This control technology is discussed below in section IV.B.5 of this preamble.

A third emissions reduction option is to limit formaldehyde emissions by restricting formaldehyde use to 400 pounds per rolling 12 month period, or if a control device is used, to an amount adjusted from 400 pounds per rolling 12 month period based on the overall control efficiency of the control system. The limit would apply to wood furniture coatings and contact adhesives. This emissions level is currently included in Table 5 to Subpart JJ of Part 63—List of VHAP of Potential Concern Identified by Industry of the Wood Furniture Manufacturing Operations MACT standards as part of the work practice requirement to have a Formulation Assessment Plan for finishing operations. The usage level provided in Table 5 to Subpart JJ of Part 63—List of VHAP of Potential Concern Identified by Industry of the Wood Furniture Manufacturing Operations MACT standards is 0.2 TPY. Under the current Wood Furniture MACT standards, if a facility's annual usage of formaldehyde exceeds its baseline level, the owner or operator of the facility provides a written notification to the permitting authority describing the amount of the increase and explains the reasons for exceedance of the baseline level. If the exceedance is no more than 15 percent above the baseline, or if usage is below the level in Table 5 to Subpart JJ of Part 63—List of VHAP of Potential Concern Identified by Industry, then no further explanation is required. See 40 CFR 63.803(l). This third emissions reduction option would change the formaldehyde usage level in the existing Wood Furniture Operations MACT standards to a limit not to be exceeded at any time. Based on the updated dataset described in section V.B.2, 39 of the 385 facilities use (and emit) more than 400 pounds per rolling 12-month period of formaldehyde. By setting a usage limit of 400 pounds per rolling 12-month period, we estimate that the formaldehyde emissions from these 39 facilities will be reduced from 20.125 TPY to 10.665 TPY, a 9.46 TPY or 47 percent reduction.

As described in the risk assessment section above, we estimate that formaldehyde emissions from 11 facilities (about three percent) could result in exceedances of the acute REL, indicating a potential for acute non-cancer risks of concern. We did not see

a potential for any facility to cause exceedances of the acute ERPG-1 or AEGL-1 levels. These 11 facilities are among the 39 facilities that use and emit formaldehyde in excess of 400 pounds per year. Moreover, formaldehyde emissions from these facilities also drive the maximum lifetime individual cancer risks. Therefore, reductions in formaldehyde emissions will reduce these risks. We estimate that limiting formaldehyde use to no more than 400 pounds per rolling 12 month period will reduce the maximum acute HQ value based on the REL for formaldehyde from 7 to 3, and will reduce the maximum lifetime individual cancer risk from 20-in-1 million to approximately 10-in-1 million, both based on the actual emissions level.³⁹

There are many coatings and adhesives available from several suppliers that contain no or low quantities of formaldehyde and that are approximately equivalent in cost to the coatings and adhesives that contain formaldehyde. Many facilities currently use these no- or low-formaldehyde coatings and adhesives. Based on our data, the wood furniture manufacturing operations at the facilities using more than 400 pounds per rolling 12 month period of formaldehyde are similar to operations at facilities currently using less than 400 pounds per rolling 12 month period of formaldehyde. Therefore, we believe it is feasible for the remaining facilities (including the 11 facilities with HQ greater than 1) to switch to coatings and adhesives containing no or low amounts of formaldehyde, at little or no extra cost, and reduce their overall usage to no more than 400 pounds per rolling 12 month period.

We are proposing to limit the formaldehyde usage to 400 pounds per 12 month rolling period as a means of reducing emissions of formaldehyde. This limit will reduce the maximum acute HQ value for formaldehyde from 7 to 3, and reduce the maximum lifetime individual cancer risk from 20-in-1 million to approximately 10-in-1 million. All affected sources are expected to meet this limit by using no- or low-formaldehyde coatings. We solicit comment on these estimated risk reductions, compliant coatings as a method for reducing the risk associated with formaldehyde, the appropriateness of the 400 lb per rolling 12-month period emissions limit on formaldehyde usage, and the feasibility and cost associated with using compliant

coatings to achieve the limit on formaldehyde usage.

The proposed emission limit is being developed primarily under CAA section 112(f)(2), and has a 2-year compliance date for existing sources pursuant to CAA section 112(f)(4). We are soliciting comment on whether the proposed formaldehyde emission limit should be issued under CAA section 112(d)(6). Standards developed under section 112(d)(6) would provide up to a three year compliance date for existing sources. We recognize that affected sources may need time to ensure that compliant coatings are available for their wood furniture manufacturing operations.

ii. Ample Margin of Safety Evaluation

In accordance with the approach established in the Benzene NESHAP, EPA weighed all health risk measures and information considered in the risk acceptability determination, along with the costs and economic impacts of emissions controls, technological feasibility, uncertainties, and other relevant factors, in making our ample margin of safety determination. We considered all of these factors in our ample margin of safety decision, and concluded that the costs of the add-on control options analyzed are not reasonable considering the emissions reductions and health benefits potentially achievable with the controls. However, as discussed above, we believe it is feasible for facilities to limit formaldehyde use to less than 400 pounds per rolling 12 month period by using no- or low-formaldehyde coatings and adhesives. This limit on formaldehyde use will also result in reduced emissions. As a result, we propose to establish a usage limit of 400 pounds per rolling 12 month period for formaldehyde under section 112(f) of the CAA.

We chose this level (of 400 pounds per rolling 12 month period) as the proposed usage limit since it is currently used in the MACT standard and since limiting emissions to this level will lead to reductions in cancer risks and the potential for acute non-cancer risks of concern. This limit would reduce formaldehyde emissions by an estimated 9.46 TPY from the baseline level of 20.125 TPY. The estimated maximum lifetime individual cancer risk would be reduced to approximately 10-in-1 million from the baseline of 20-in-1 million, the estimated cancer incidence due to emissions from the source category would be reduced by about 15 percent nationwide, and the estimated maximum acute HQ would be reduced

³⁹ We note that the estimated reduction in cancer MIR would be negligible if the CIIT URE for formaldehyde were used instead of the IRIS URE.

from 7 to 3, based on the REL for formaldehyde, and from 0.35 to 0.15, based on the AEGL-1 for formaldehyde. We estimate that there would be either no or minimal additional costs associated with this option, as the cost of no- or low-formaldehyde coatings and adhesives are approximately equal to other coating and adhesive products containing larger quantities of formaldehyde. Also, there are minimal costs associated with the recordkeeping and reporting requirements for compliance with the rule. See EPA ICR number 1716.07 for detailed information. We believe this formaldehyde limit is technically feasible for all wood manufacturing operations and is a cost-effective measure to achieve emissions and health risk reductions. Therefore, we propose that with this formaldehyde limit, the Wood Furniture Manufacturing Operations MACT standards provide an ample margin of safety to protect public health. Nevertheless, we are seeking comments on the proposed formaldehyde limit of 400 pounds per rolling 12-month period, and whether there may be an alternative level that we should consider. In addition, we are seeking comments and data on the cost and feasibility of using coatings, solvents, adhesives, and any other products covered by the Wood Furniture Manufacturing Operations MACT standards that have lower VHAP content, or contain less toxic VHAP, as well as information that would help us to refine our assessment of the chronic or acute risks of formaldehyde emissions from this source category.

While we propose that the Wood Furniture Manufacturing Operations MACT standards, revised to include the 400 pounds per rolling 12-month period formaldehyde emissions limit, will provide an ample margin of safety to protect public health, uncertainties remain concerning that an acute HQ of up to 10 may occur due to emissions of glycol ethers based on our screening level assessment. The potential risk reduction options identified would not appreciably reduce emissions or the potential acute risks associated with glycol ethers. Therefore, we are seeking comments and data regarding the use of glycol ethers in wood furniture manufacturing operations. This information includes the quantities of coatings and adhesives used (TPY); the speciated glycol ethers content in these products; whether the use of these products is in the kitchen cabinet, business furniture, or home furnishings sector; and the availability and

feasibility of using coatings and adhesive products with a lower content of glycol ethers.

5. What are our proposed decisions on the technology review?

We evaluated developments in practices, processes, and control technologies applicable to the Wood Furniture Manufacturing Operations source category. This included an internet search, a search of the RBLC Clearinghouse, a review of relevant subsequently developed regulations, and contacts with industry. We found one advance in add-on control technology since the Wood Furniture Manufacturing Operations MACT standards were promulgated, we have determined that there are more stringent VOC-based coatings limits for wood furniture manufacturing facilities in one area of California, and we have found that fewer conventional spray guns are in use. For more detail, see the memorandum *Developments in Practices, Processes, and Control Technologies*, dated August 24, 2010, in the docket for this action that describes the technology review for the Wood Furniture Manufacturing Operations source category.

With regard to add-on technology, we identified one facility in Indiana that manufactures kitchen cabinets and uses an RTO to control spray booth emissions from its wood furniture manufacturing operations. The facility coats flat panels using an automated process with high speed lines. We estimate cost-effectiveness of the RTO system at this facility to be \$20,000 per ton of HAP reduced.

Nationwide, we estimate that fewer than five facilities manufacture wood furniture using automated, high speed lines, and could install this type of add-on control device. Therefore, the RTO control technology is not applicable across the entire wood furniture source category. The estimated emissions reduction, based on these five facilities, is 98 tons of HAP per year. The cost to treat low-HAP concentration, high volume air streams routed to the RTO is estimated to be \$20,000 per ton of HAP reduced, and is considered economically prohibitive when compared to the amount of emissions reduced. Based on per facility sales, we determined that this option is not affordable. The cost as a percentage of revenues was estimated to be 73 percent or greater. Additional information on the affordability of controls is discussed in the memorandum *Affordability of Lower VHAP Coatings and Add-on Controls for Wood Furniture Manufacturing Operations*, dated

October 28, 2010, in the docket for this action. The large amount of fuel required for this type of add-on control would be a significant disadvantage and the fuel produces NO_x emissions, a by-product of combustion. Finally, facilities must have a large physical land space to house the RTO. For these reasons, we determined that the installation of a RTO on spray booths is not a viable option for the wood furniture manufacturing industry. For more detail, see the memo *Cost Analyses for Control Options*, dated September 27, 2010, in the docket for this action that describes the cost analysis for the Wood Furniture Manufacturing Operations source category.

In our review of developments in practices, processes, and control technologies, we identified the Bay Area Air Quality Management District in California as having adopted more stringent VOC coating emission limits than the VHAP coating emission limits in the Wood Furniture MACT standards. However, the California limits came into effect in July 2010, and we do not have data to demonstrate whether the facilities in this area have been able to achieve compliance with these limits or the measures they may be taking to comply with them. The California limits are VOC-based, and coating limits in the Wood Furniture MACT standard are VHAP-based. We do not have information on the exact correlation between lower-VOC content and lower-HAP content in coatings (e.g., if lower VOC content leads to lower HAP content). We believe that coatings used in the industry average approximately 50 percent HAP and 50 percent non-HAP VOC, however the HAP and non-HAP VOC content varies between specific coating products.⁴⁰ Using this assumed average HAP-to-VOC content, we estimate that by adopting the California VOC limits, the industry-wide emission reduction would be 56 tons of HAP per year at a cost of \$30,000 per ton of HAP reduced for the approximately 406 facilities in the source category. Based on per facility sales, we determined that this option may be affordable. The cost as a percentage of revenues was estimated to be less than four percent. Additional information on the affordability of lower VHAP coatings is discussed in the memorandum *Affordability of Lower VHAP Coatings and Add-on Controls for Wood Furniture Manufacturing Operations*, dated October 28, 2010, in

⁴⁰ Case Studies comparing HAP and VOC content of wood furniture coatings at <http://www.epa.gov/ttn/atw/wood/low/casebyco.html>.

the docket for this action. Nevertheless, due to the factors described above including the limited emissions reduction potential and the cost effectiveness, we are not proposing to require lowering the VHAP content in coatings in the MACT standards. However, we solicit comments and data regarding lower VHAP coatings and information on the types of wood furniture manufacturing coating operations for which they may be applicable.

When the Wood Furniture MACT standards were promulgated, conventional guns were used extensively by industry. Since promulgation, the use of conventional guns in the wood furniture industry has diminished drastically, and they are now rarely used. We are proposing to remove the provision in the Wood Furniture MACT standards that allows the use of conventional air spray guns; thereby codifying current industry practice. This proposed action will prevent future increases in the use of conventional spray guns, which have lower transfer efficiencies and higher emissions than other spray gun types. Based on our findings, it is possible to replace conventional air spraying with more efficient spray application methods such as air assisted airless spraying. We anticipate no changes in coating formulation will be needed to use air assisted airless spray guns rather than conventional spray guns. As conventional spray guns are now rarely used, we do not estimate there will be any appreciable emission reductions as a result of this proposed provision. For more details, see *Impacts of Prohibiting the Use of Conventional Spray Guns in the Wood Furniture Manufacturing Operations Source Category*, dated October 19, 2010.

The associated cost of discontinuing use of conventional air spray guns is believed to be minimal. Overall, we do not believe many conventional guns are in use and need to be replaced. However, for the remaining conventional spray guns, we also estimate there to be a net cost savings by switching to air assisted airless spray guns. While an air assisted airless spray gun is estimated to cost approximately \$300 more than a conventional spray gun, the 10 percent increase in transfer efficiency results in an equally lower coating use and cost savings. We estimate that for a single spray gun, if the coating cost is \$10/gallon and the rate of coating use is at least 1.1 gallons per day, the initial cost difference between the guns is made up within a year. For more expensive coatings, the cost difference is made up more quickly.

In addition, the expected life of a conventional spray gun is estimated to be, at most, 2 years. The compliance period of the rule is three years; therefore, no air assisted airless guns would be required to replace a conventional spray gun before the end of its useful life as a result of the revised Wood Furniture MACT standards. For more details, see *Impacts of Prohibiting the Use of Conventional Spray Guns in the Wood Furniture Manufacturing Operations Source Category*, dated October 19, 2010 in the docket for this action. We solicit comment on the accuracy of our assumptions about coating use, coating costs, transfer efficiency of spray guns, spray gun replacement frequency, any additional cost associated with switching gun technology such as attachment replacements, the need for additional training associated with switching spray guns and the costs of training, if needed and the extent to which facilities are already using air assisted airless spray guns.

In summary, as a result of the technology review under section 112(d)(6) of the CAA, we are proposing to prohibit the use of conventional spray guns by facilities regulated by the Wood Furniture Manufacturing Operations MACT standard. Existing sources would be required to comply with this proposed change by 3 years after the effective date.

6. What other actions are we proposing?

We are proposing the elimination of the SSM exemption in the Wood Furniture Manufacturing Operations MACT standards. Consistent with *Sierra Club v. EPA*, EPA is proposing standards in this rule that apply at all times. We are proposing several revisions to 40 CFR part 63, subpart JJ regarding the standards that apply during periods of SSM. Specifically, we are proposing to revise Table 1 to Subpart JJ of Part 63—General Provisions Applicability to Subpart JJ to indicate that the requirements in 40 CFR 63.6(e)(1)(i) of the *General Provisions* do not apply. Section 63.6(e)(1)(i) requires owners or operators to act according to the general duty to “operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions.” We are separately proposing to incorporate this general duty to minimize emissions into section 63.802(c). Section 40 CFR 63.6(e)(3) also requires the owner or operator of an affected source to develop a written SSM plan. We are proposing

to remove the SSM plan requirement. We are also proposing to add SSM-associated reporting and recordkeeping requirements in 40 CFR 63.806 and 63.807 to require reporting and recordkeeping for periods of malfunction, add a requirement in 40 CFR 63.805 to require performance tests to be performed under normal operating conditions, and to revise Table 1 to Subpart JJ of Part 63—General Provisions Applicability to Subpart JJ to specify that 40 CFR 63.6(e)(1)(i) and (ii), 63.6(e)(3), 63.6(f)(1), 40 CFR 63.7(e)(1), 40 CFR 63.8(c)(1)(i) and (iii), and the last sentence of 63.8(d)(3), 40 CFR 63.10(b)(2)(i),(ii), (iv), and (v), 63.10(c)(10), (11), and (15), and 63.10(d)(5) of the *General Provisions* do not apply. In addition, as explained above, we are proposing to add an affirmative defense to civil penalties for exceedances of emission limits caused by malfunctions, as well as criteria for establishing the affirmative defense in section 63.800. EPA has attempted to ensure that we have not included in the proposed regulatory language any provisions that are inappropriate, unnecessary, or redundant in the absence of the SSM exemption. We are specifically seeking comment on whether there are any such provisions that we have inadvertently incorporated or overlooked.

VI. Proposed Action

A. What actions are we proposing as a result of the technology review?

For the Shipbuilding and Ship Repair (Surface Coating) source category, we have determined that there have been no developments in practices, processes, or control technologies since the promulgation of the MACT standards that are feasible for the facilities in these source categories to implement at this time, and we are proposing that it is not necessary to revise the existing MACT requirements based on our CAA section 112(d)(6) review.

For the Wood Furniture Manufacturing Operations source category, we are proposing to amend the rule to prohibit the use of conventional spray guns under the authority of CAA section 112(d)(6).

B. What actions are we proposing as a result of the residual risk review?

For the Shipbuilding and Ship Repair (Surface Coating) source category, we propose that the MACT standards provide an ample margin of safety to protect public health and prevent adverse environmental effects. Thus, we are proposing to re-adopt these

standards for the purpose of meeting the requirements of CAA section 112(f)(2).

For the Wood Furniture Manufacturing Operations source category, to provide an ample margin of safety to protect public health and prevent adverse environmental effects for the purpose of meeting the requirements of CAA section 112(f)(2), we propose to limit usage of formaldehyde in coatings and contact adhesives to 400 pounds per rolling 12 month period.

Existing sources would be required to comply with this proposed change by 2 years after the effective date.

C. What other actions are we proposing?

We propose to amend the Shipbuilding and Ship Repair (Surface Coating) and Wood Furniture Manufacturing Operations MACT standards to remove the language that exempts facilities from the emissions standards that would otherwise be applicable during periods of SSM, and to add an affirmative defense to civil penalties for exceedances of emission standards caused by malfunctions. These changes are being made to ensure these rules are consistent with the court's ruling in *Sierra Club v. EPA*, 551 F.3d 1019 (DC Cir. 2008).

We also propose to clarify the applicability language for Wood Furniture Manufacturing Operations to be consistent with surface coating rules issued after the promulgation of the Wood Furniture MACT standards in 1995. These include subparts MMMM, PPPP, QQQQ, and RRRR of part 63. Subparts MMMM, PPPP, QQQQ, and RRRR exempt surface coating operations that are subject to other subparts of Part

63, such as the Wood Furniture Operations MACT standards. (See 40 CFR §§ 63.3881(c)(6), 63.4481(c)(7), 63.4681(c)(2), 63.4881(c)(2)). Similarly, we propose to amend the Wood Furniture Operations MACT standards to acknowledge that surface coating operations that are subject to subparts MMMM, PPPP, QQQQ, or RRRR of Part 63 are not subject to the Wood Furniture Manufacturing Operations standards. Subparts MMMM, PPPP, and QQQQ also include provisions providing compliance options for facilities potentially subject to more than one subpart applicable to surface coating operations. (See 40 CFR §§ 63.3881(e), 63.4481(e), 63.4681(d)).

VII. Request for Comments

We are soliciting comments on all aspects of this proposed action. All comments received during the comment period will be considered. In addition to general comments on the proposed actions, we are also interested in any additional data that may help to reduce the uncertainties inherent in the risk assessments. We are specifically interested in receiving corrections to the datasets used for risk modeling. Such data should include supporting documentation in sufficient detail to allow characterization of the quality and representativeness of the data or information. Please see the following section for more information on submitting data. We are also interested in comments and information regarding add-on controls and any lower-HAP coatings available for use by these source categories and the types of coating activities for which they could

be used. We are also seeking comments on the potential for lower HAP content in other products used in the Wood Furniture Production industry, including glues, resins and adhesives.

VIII. Submitting Data Corrections

The facility-specific data used in the source category risk analyses, facility-wide analyses, and demographic analyses for each source category subject to this action are available for download on the RTR Web Page at <http://www.epa.gov/ttn/atw/rtr/rtrpg.html>. These data files include detailed information for each HAP emissions release point at each facility included in the source category and all other HAP emissions sources at these facilities (facility-wide emissions sources). However, it is important to note that the source category risk analysis included only those emissions tagged with the MACT code associated with the source category subject to the risk analysis.

If you believe the data are not representative or are inaccurate, please identify the data in question, provide your reason for concern, and provide any "improved" data that you have, if available. When you submit data, we request that you provide documentation of the basis for the revised values to support your suggested changes. To submit comments on the data downloaded from the RTR Web page, complete the following steps:

1. Within this downloaded file, enter suggested revisions to the data fields appropriate for that information. The data fields that may be revised include the following:

Data element	Definition
Control Measure	Are control measures in place? (yes or no).
Control Measure Comment	Select control measure from list provided, and briefly describe the control measure.
Delete	Indicate here if the facility or record should be deleted.
Delete Comment	Describes the reason for deletion.
Emission Calculation Method Code For Revised Emissions.	Code description of the method used to derive emissions. For example, CEM, material balance, stack test, etc.
Emission Process Group	Enter the general type of emission process associated with the specified emission point.
Fugitive Angle	Enter release angle (clockwise from true North); orientation of the y-dimension relative to true North, measured positive for clockwise starting at 0 degrees (maximum 89 degrees).
Fugitive Length	Enter dimension of the source in the east-west (x-) direction, commonly referred to as length (ft).
Fugitive Width	Enter dimension of the source in the north-south (y-) direction, commonly referred to as width (ft).
Malfunction Emissions	Enter total annual emissions due to malfunctions (TPY).
Malfunction Emissions Max Hourly	Enter maximum hourly malfunction emissions here (lb/hr).
North American Datum	Enter datum for latitude/longitude coordinates (NAD27 or NAD83); if left blank, NAD83 is assumed.
Process Comment	Enter general comments about process sources of emissions.
REVISED Address	Enter revised physical street address for MACT facility here.
REVISED City	Enter revised city name here.
REVISED County Name	Enter revised county name here.
REVISED Emission Release Point Type.	Enter revised Emission Release Point Type here.
REVISED End Date	Enter revised End Date here.
REVISED Exit Gas Flow Rate	Enter revised Exit Gas Flowrate here (ft ³ /sec).
REVISED Exit Gas Temperature	Enter revised Exit Gas Temperature here (F).
REVISED Exit Gas Velocity	Enter revised Exit Gas Velocity here (ft/sec).
REVISED Facility Category Code ..	Enter revised Facility Category Code here, which indicates whether facility is a major or area source.

Data element	Definition
REVISED Facility Name	Enter revised Facility Name here.
REVISED Facility Registry Identifier	Enter revised Facility Registry Identifier here, which is an ID assigned by the EPA Facility Registry System.
REVISED HAP Emissions Performance Level Code	Enter revised HAP Emissions Performance Level here.
REVISED Latitude	Enter revised Latitude here (decimal degrees).
REVISED Longitude	Enter revised Longitude here (decimal degrees).
REVISED MACT Code	Enter revised MACT Code here.
REVISED Pollutant Code	Enter revised Pollutant Code here.
REVISED Routine Emissions	Enter revised routine emissions value here (TPY).
REVISED SCC Code	Enter revised SCC Code here.
REVISED Stack Diameter	Enter revised Stack Diameter here (ft).
REVISED Stack Height	Enter revised Stack Height here (Ft).
REVISED Start Date	Enter revised Start Date here.
REVISED State	Enter revised State here.
REVISED Tribal Code	Enter revised Tribal Code here.
REVISED Zip Code	Enter revised Zip Code here.
Shutdown Emissions	Enter total annual emissions due to shutdown events (TPY).
Shutdown Emissions Max Hourly	Enter maximum hourly shutdown emissions here (lb/hr).
Stack Comment	Enter general comments about emission release points.
Startup Emissions	Enter total annual emissions due to startup events (TPY).
Startup Emissions Max Hourly	Enter maximum hourly startup emissions here (lb/hr).
Year Closed	Enter date facility stopped operations.

2. Fill in the commenter information fields for each suggested revision (*i.e.*, commenter name, commenter organization, commenter e-mail address, commenter phone number, and revision comments).

3. Gather documentation for any suggested emissions revisions (*e.g.*, performance test reports, material balance calculations, etc.).

4. Send the entire downloaded file with suggested revisions in Microsoft® Access format and all accompanying documentation to Docket ID Number EPA-HQ-OAR-2010-0786 (through one of the methods described in the **ADDRESSES** section of this preamble). To expedite review of the revisions, it would also be helpful if you submitted a copy of your revisions to the EPA directly at RTR@epa.gov in addition to submitting them to the docket.

5. If you are providing comments on a facility with multiple source categories, you need only submit one file for that facility, which should contain all suggested changes for all source categories at that facility. We request that all data revision comments be submitted in the form of updated Microsoft® Access files, which are provided on the <http://www.epa.gov/ttn/atw/risk/rtrpg.html> Web page.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a significant regulatory action because it raises novel legal and policy issues. Accordingly, EPA submitted this action to OMB for review under Executive

Order 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the *PRA*, 44 U.S.C. 3501, *et seq.* The ICR document prepared by EPA has been assigned EPA ICR number 1716.07.

The proposed revisions to the SSM provisions for the standards being amended with this proposed rule will reduce the reporting burden associated with having to prepare and submit a SSM report. However, we are proposing new paperwork requirements to the Wood Furniture Manufacturing Operations MACT standards. The proposed standards would require regulated entities to submit reports and keep records in accordance with Section V.B. We are not proposing any new paperwork requirements for the Shipbuilding and Ship Repair (Surface Coating) source category.

We estimate that there are approximately 406 regulated entities currently subject to the National Emission Standards for Wood Furniture Manufacturing Operations and that approximately 150 of those entities will be subject to the proposed rule involving the 12-month rolling average formaldehyde limit. New and existing regulated entities would have no capital costs associated with the information collection requirements in the proposed rule.

The estimated annual average recordkeeping and reporting burden after the effective date of the proposed

rule is estimated to be 2,001 labor hours at a cost of approximately \$200,000.00. This estimate includes the cost of reporting, including reading instructions, and information gathering. Recordkeeping cost estimates include reading instructions, planning activities, calculation of formaldehyde usage, and maintenance of 12-month rolling data. The average hours and cost per regulated entity would be 15 hours and \$1,400.00. About 406 facilities would respond per year. Burden is defined at 5 CFR 1320.3(b).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA-HQ-OAR-2010. Submit any comments related to the ICR to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after December 21, 2010, a comment to OMB is best assured of having its full effect if OMB receives it by January 20, 2011. The final rule will respond to any OMB or

public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the APA or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this proposed rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined by the SBA's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The costs associated with the proposed requirements in this proposed rule (*i.e.*, the formaldehyde emissions limit and conventional spray gun prohibition) are negligible as discussed above.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This proposed rule does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, in the aggregate, or to the private sector in any one year. This proposed rule does mandate a lowering of formaldehyde usage and a ban on the use of conventional spray guns but the nationwide annualized cost of these mandates are estimated to be approximately \$200,000 for affected sources. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

This proposed rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that

apply to such governments nor does it impose obligations upon them.

E. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The burden to the respondents and the states is less than \$500,000 for the entire source category. Thus, Executive Order 13132 does not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA specifically solicits comment on this proposed rule from state and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 9, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement. EPA has concluded that this proposed rule will not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This proposed rule is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action would not relax

the control measures on existing regulated sources. EPA's risk assessments (included in the docket for this proposed rule) demonstrate that the existing regulations are associated with an acceptable level of risk and that the proposed additional requirements for the Wood Furniture Manufacturing Operations source category will provide an ample margin of safety to protect public health.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined under Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001), because it is not likely to have significant adverse effect on the supply, distribution, or use of energy. This action will not create any new requirements for sources in the energy supply, distribution, or use sectors.

I. National Technology Transfer and Advancement Act

Section 12(d) of the NTTAA of 1995, Public Law 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use VCS in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable VCS.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any VCS.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on EJ. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make EJ part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

To examine the potential for any EJ issues that might be associated with each source category, we evaluated the distributions of HAP-related cancer and non-cancer risks across different social, demographic, and economic groups within the populations living near the facilities where these source categories are located. The methods used to conduct demographic analyses for this rule are described in section IV.A of the preamble for this rule. The development of demographic analyses to inform the consideration of EJ issues in EPA rulemakings is an evolving science. The EPA offers the demographic analyses in this proposed rulemaking as examples of how such analyses might be developed to inform such consideration, and invites public comment on the approaches used and the interpretations made from the results, with the hope that this will support the refinement and improve utility of such analyses for future rulemakings.

For the demographic analyses, we focused on the populations within 50 km of any facility estimated to have exposures to HAP which result in cancer risks of 1-in-1 million or greater, or non-cancer HI of 1 or greater (based on the emissions of the source category or the facility, respectively). We examined the distributions of those risks across various demographic groups, comparing the percentages of particular demographic groups to the total number of people in those demographic groups nationwide. The results, including other risk metrics, such as average risks for the exposed populations, are documented in source category-specific technical reports in the docket for both source categories covered in this proposal.

As described in the preamble, for the Shipbuilding and Ship Repair (Surface Coating) and Wood Furniture Manufacturing Operations MACT standard source categories, our risk assessments demonstrate that the regulations are associated with an acceptable level of risk and that the proposed additional requirements for the Wood Furniture Manufacturing Operations source category will provide an ample margin of safety to protect public health.

Our analyses also show that, for these source categories, there is no potential for an adverse environmental effect or human health multi-pathway effects, and that acute and chronic non-cancer health impacts are unlikely. EPA has determined that although there may be an existing disparity in HAP risks from these sources between some demographic groups, no demographic

group is exposed to an unacceptable level of risk.

List of Subjects in 40 CFR Part 63

Environmental protection, Air pollution control, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: December 3, 2010.

Lisa P. Jackson,
Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend title 40, chapter I of the Code of Federal Regulations as follows:

PART 63—[AMENDED]

1. The authority citation for part 63 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart II—[AMENDED]

2. Section 63.781 is amended by revising paragraph (d) to read as follows:

§ 63.781 Applicability.

* * * * *

(d) If you are authorized in accordance with 40 CFR 63.783(c) to use an add-on control system as an alternative means of limiting emissions from coating operations, in response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined in 40 CFR 63.2. Appropriate penalties may be assessed, however, if the respondent fails to meet its burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(1) To establish the affirmative defense in any action to enforce such a limit, the owners or operators of facilities must timely meet the notification requirements in paragraph (d)(2) of this section, and must prove by a preponderance of evidence that:

(i) The excess emissions:

(A) Were caused by a sudden, short, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(D) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(ii) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(iii) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, severe personal injury, or severe property damage; and

(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health; and

(vi) All emissions monitoring and control systems were kept in operation if at all possible; and

(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(viii) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(ix) A written root cause analysis has been prepared to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(2) Notification. The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile transmission as soon as possible, but no later than two business days after the initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 30 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (d)(1) of this section.

3. Section 63.782 is amended by adding a definition for “affirmative defense” to read as follows:

§ 63.782 Definitions.

* * * *

Affirmative defense means, in the context of an enforcement proceeding, a response or a defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * *

4. Section 63.783 is amended by redesignating paragraphs (b)(1) and (b)(2) as (b)(2) and (b)(3) and adding a new paragraph (b)(1) to read as follows:

§ 63.783 Standards.

* * * *

(b) * * *

(1) At all times the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

* * * *

5. Section 63.785 is amended by adding paragraph (e) to read as follows:

§ 63.785 Compliance procedures.

* * * *

(e) Continuous compliance requirements. You must demonstrate continuous compliance with the emissions standards and operating limits by using the performance test methods and procedures in § 63.786 for each affected source.

(1) *General requirements.* (i) You must monitor and collect data, and provide a site specific monitoring plan, as required by §§ 63.783, 63.785, 63.786 and 63.787.

(ii) Except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), you must operate the monitoring system and collect data at all required intervals at all times the affected source is operating, and periods of malfunction. Any period for which data collection is required and the

operation of the CEMS is not otherwise exempt and for which the monitoring system is out-of-control and data are not available for required calculations constitutes a deviation from the monitoring requirements.

(iii) You may not use data recorded during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data.

Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. The owner or operator must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(2) [Reserved]

6. Section 63.786 is amended by adding paragraph (e) to read as follows:

§ 63.786 Test methods and procedures.

* * * *

(e) For add-on control systems approved for use in limiting emissions from coating operations pursuant to § 63.783(c), performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

7. Section 63.788 is amended by adding paragraph (b)(5) and revising paragraph (c) to read as follows:

§ 63.788 Recordkeeping and reporting requirements.

* * * *

(b) * * *

(5) Each owner or operator that receives approval pursuant to § 63.783(c) to use an add-on control system to control coating emissions shall maintain records of the occurrence and duration of each malfunction of operation (*i.e.*, process equipment) or the required air pollution control and monitoring equipment. Each owner or operator shall maintain records of actions taken during periods of malfunction to minimize emissions in accordance with § 63.783(b)(1), including corrective actions to restore malfunctioning process and air pollution control and monitoring

equipment to its normal or usual manner of operation.

(c) *Reporting requirements.* Before the 60th day following completion of each 6-month period after the compliance date specified in § 63.784, each owner or operator of an affected source shall submit a report to the Administrator for each of the previous six months. The report shall include all of the information that must be retained pursuant to paragraphs (b)(2) through (3) of this section, except for that information specified in paragraphs (b)(2)(i) through (ii), (b)(2)(v), (b)(3)(i)(A), (b)(3)(ii)(A), and (b)(3)(iii)(A). If a violation at an affected source is detected, the owner or operator of the affected source shall also report the information specified in paragraph (b)(4) of this section for the reporting period during which the violation(s) occurred. To the extent possible, the report shall be organized according to the compliance procedure(s) followed each month by the affected source. If there was a malfunction during the reporting period, the report must also include the number, duration, and a brief description of each malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 63.783(b)(1), including actions taken to correct a malfunction.

8. Table 1 to subpart II of part 63 is amended:

- a. By removing entry 63.6(e)–(f);
- b. By adding entries 63.6(e)(1)(i), 63.6(e)(1)(ii), 63.6(e)(1)(iii); 63.6(e)(2), 63.6(e)(3), 63.6(f)(1), and 63.6(f)(2)–(f)(3);
- c. By removing entry 63.7;
- d. By adding entries 63.7(a)–(d), 63.7(e)(1), and 63.7(e)(2)–(e)(4);
- e. By revising entry 63.8;
- f. By removing entry 63.10(a)–(b);
- g. By adding entries 63.10(a), 63.10(b)(1), 63.10(b)(2)(i), 63.10(b)(2)(ii), 63.10(b)(2)(iii), 63.10(b)(2)(iv)–(b)(2)(v), 63.10(b)(2)(vi)–(b)(2)(xiv), and 63.10(b)(3);
- h. By removing entries 63.10(c);
- i. By adding entries 63.10(c)(1)–(9), 63.10(c)(10)–(11), 63.10(c)(12)–(14), and 63.10(c)(15);
- j. By removing entry 63.10(d); and
- k. By adding entries 63.10(d)(1)–(4) and 63.10(d)(5).

The revisions read as follows:

TABLE 1 TO SUBPART II OF PART 63—GENERAL PROVISIONS OF APPLICABILITY TO SUBPART II

Reference	Applies to subpart II	Comment
63.6(e)(1)(i)	No	See § 63.783(b)(1) for general duty requirement.
63.6(e)(1)(ii)	No	
63.6(e)(1)(iii)	Yes	
63.6(e)(2)	No	Section reserved.
63.6(e)(3)	No	
63.6(f)(1)	No	
63.6(f)(2)–(f)(3)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then this section does apply.
63.7(a)–(d)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then these sections do apply.
63.7(e)(1)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then see § 63.786(e).
63.7(e)(2)–(e)(4)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then these sections do apply.
63.8	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then this section does apply, with the exception of § 63.8(c)(1)(i), § 63.8(c)(1)(iii), and the last sentence of § 63.8(d)(3).
63.10(a)	Yes	
63.10(b)(1)	Yes	
63.10(b)(2)(i)	No	
63.10(b)(2)(ii)	No	See § 63.788(b)(5) for recordkeeping of occurrence, duration, and actions taken during malfunctions.
63.10(b)(2)(iii)	Yes	
63.10(b)(2)(iv)–(b)(2)(v)	No	
63.10(b)(2)(vi)–(b)(2)(xiv)	Yes	
63.10(b)(3)	Yes	
63.10(c)(1)–(9)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then these sections do apply.
63.10(c)(10)–(11)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then see § 63.788(b)(5) for records of malfunctions.
63.10(c)(12)–(14)	No	If an alternative means of limiting emissions (e.g., an add-on control system) is used to comply with subpart II in accordance with § 63.783(c), then these sections do apply.
63.10(c)(15)	No	
63.10(d)(1)–(4)	Yes	
63.10(d)(5)	No	See § 63.788(c) for reporting malfunctions.

9. Table 3 to subpart II of part 63 is amended by revising entry “Determination of whether containers

meet the standards described in § 63.783(b)(2)” to read as follows:

TABLE 3 TO SUBPART II OF PART 63—SUMMARY OF RECORDKEEPING AND REPORTING REQUIREMENTS ^{a b c}

Requirement	All Opts.		Option 1		Option 2		Option 3	
	Rec	Rep	Rec	Rep	Rec	Rep	Rec	Rep
* * * * *								
Determination of whether containers meet the standards described in § 63.783(b)(3)	X	X						
* * * * *								

^a Affected sources that comply with the cold-weather limits must record and report additional information, as specified in § 63.788(b)(3)(ii)(C), (iii)(C), and (iv)(D).

^b Affected sources that detect a violation must record and report additional information, as specified in § 63.788(b)(4).

^c OPTION 4: the recordkeeping and reporting requirements of Option 4 are identical to those of Options 1, 2, or 3, depending on whether and how thinners are used. However, when using Option 4, the term “VOHAP” shall be used in lieu of the term “VOC,” and the owner or operator shall record and report the Administrator-approved VOHAP test method or certification procedure.

* * * * *

Subpart JJ—[AMENDED]

10. Section 63.800 is amended:

- a. By redesignating paragraphs (f) and (g) as paragraphs (h) and (i);
- b. By redesignating paragraphs (d) and (e) as paragraphs (e) and (f);
- c. By adding new paragraphs (d) and (g); and
- d. By adding paragraph (j) to read as follows:

§ 63.800 Applicability.

* * * * *

(d) This subpart does not apply to any surface coating or coating operation that meets any of the criteria of paragraphs (d)(1) through (4) of this section.

(1) Surface coating of metal parts and products other than metal components of wood furniture that meets the applicability criteria for miscellaneous metal parts and products surface coating (subpart MMMM of this part).

(2) Surface coating of plastic parts and products other than plastic components of wood furniture that meets the applicability criteria for plastic parts and products surface coating (subpart PPPP of this part).

(3) Surface coating of wood building products that meets the applicability criteria for wood building products surface coating (subpart QQQQ of this part). The surface coating of millwork and trim associated with cabinet manufacturing are subject to subpart JJ.

(4) Surface coating of metal furniture that meets the applicability criteria for metal furniture surface coating (subpart RRRR of this part). Surface coating of metal components of wood furniture performed at a wood furniture or wood furniture component manufacturing facility are subject to subpart JJ.

* * * * *

(g) Existing affected sources shall be in compliance with § 63.802(a)(4) no later than [DATE 2 YEARS FROM DATE OF PUBLICATION OF THE FINAL

RULE IN THE *FEDERAL REGISTER*] and § 63.803(h) no later than [DATE three YEARS FROM DATE OF PUBLICATION OF THE FINAL RULE IN THE *FEDERAL REGISTER*]. The owner or operator of an existing area source that increases its emissions of (or its potential to emit) HAP such that the source becomes a major source that is subject to this subpart shall comply with this subpart one year after becoming a major source.

* * * * *

(j) If the owner or operator, in accordance with 40 CFR 63.804, uses a control system as a means of limiting emissions, in response to an action to enforce the standards set forth in this subpart, you may assert an affirmative defense to a claim for civil penalties for exceedances of such standards that are caused by malfunction, as defined in 40 CFR 63.2. Appropriate penalties may be assessed, however, if the respondent fails to meet its burden of proving all the requirements in the affirmative defense. The affirmative defense shall not be available for claims for injunctive relief.

(1) To establish the affirmative defense in any action to enforce such a limit, the owner or operator of facilities must timely meet the notification requirements in paragraph (j)(2) of this section, and must prove by a preponderance of evidence that:

(i) The excess emissions:

(A) Were caused by a sudden, short, infrequent, and unavoidable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner; and

(B) Could not have been prevented through careful planning, proper design or better operation and maintenance practices; and

(C) Did not stem from any activity or event that could have been foreseen and avoided, or planned for; and

(D) Were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(ii) Repairs were made as expeditiously as possible when the applicable emission limitations were being exceeded. Off-shift and overtime labor were used, to the extent practicable to make these repairs; and

(iii) The frequency, amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions; and

(iv) If the excess emissions resulted from a bypass of control equipment or a process, then the bypass was unavoidable to prevent loss of life, severe personal injury, or severe property damage; and

(v) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality, the environment, and human health; and

(vi) All emissions monitoring and control systems were kept in operation if at all possible; and

(vii) All of the actions in response to the excess emissions were documented by properly signed, contemporaneous operating logs; and

(viii) At all times, the facility was operated in a manner consistent with good practices for minimizing emissions; and

(ix) A written root cause analysis has been prepared to determine, correct and eliminate the primary causes of the malfunction and the excess emissions resulting from the malfunction event at issue. The analysis shall also specify, using best monitoring methods and engineering judgment, the amount of excess emissions that were the result of the malfunction.

(2) *Notification.* The owner or operator of the facility experiencing an exceedance of its emission limit(s) during a malfunction shall notify the Administrator by telephone or facsimile transmission as soon as possible, but no later than two business days after the

initial occurrence of the malfunction, if it wishes to avail itself of an affirmative defense to civil penalties for that malfunction. The owner or operator seeking to assert an affirmative defense shall also submit a written report to the Administrator within 30 days of the initial occurrence of the exceedance of the standard in this subpart to demonstrate, with all necessary supporting documentation, that it has met the requirements set forth in paragraph (h)(1) of this section.

11. Section 63.801 is amended by:

a. Adding a definition for "affirmative defense" and revising the definition for "wood furniture" in paragraph (a); and
b. Adding (b)(24) through (b)(28).

The additions and revisions read as follows:

§ 63.801 Definitions.

(a) * * *

Affirmative defense means, in the context of an enforcement proceeding, a response or a defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.

* * * * *

Wood furniture means any product made of wood, a wood product such as rattan or wicker, or an engineered wood product such as particleboard that is manufactured at any facility that is engaged, either in part or in whole, in the manufacture of wood furniture or wood furniture components, including, but not limited to, facilities under any of the following standard industrial classification codes: 2434, 2511, 2512, 2517, 2519, 2521, 2531, 2541, 2599, or 5712.

* * * * *

(b) * * *

(24) C_f = the formaldehyde content of a finishing material (c), in pounds of formaldehyde per gallon of coating (lb/gal).

(25) F_{total} = total formaldehyde emissions in each rolling 12-month period.

(26) G_f = the formaldehyde content of a contact adhesive (g), in pounds of formaldehyde per gallon of contact adhesive (lb/gal).

(27) V_c = the volume of formaldehyde-containing finishing material (c), in gal.

(28) V_g = the volume of formaldehyde-containing contact adhesive (g), in gal.

12. Section 63.802 is amended by adding paragraphs (a)(4), (b)(4), and (c) to read as follows:

§ 63.802 Emission limits.

(a) * * *

(4) Limit total formaldehyde (F_{total}) emissions from finishing operations and

contact adhesives to no more than 400 lb per rolling 12-month period.

(b) * * *

(4) Limit total formaldehyde (F_{total}) emissions from finishing operations and contact adhesives to no more than 400 lb per rolling 12-month period.

(c) At all times, the owner or operator must operate and maintain any affected source, including associated air pollution control equipment and monitoring equipment, in a manner consistent with safety and good air pollution control practices for minimizing emissions. Determination of whether such operation and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, review of operation and maintenance procedures, review of operation and maintenance records, and inspection of the source.

13. Section 63.803 is amended by revising paragraph (h) to read as follows:

§ 63.803 Work practice standards.

* * * * *

(h) Application equipment requirements. Each owner or operator of an affected source shall not use conventional air spray guns.

* * * * *

14. Section 63.804 is amended by adding paragraphs (g)(9) and (h) to read as follows:

§ 63.804 Compliance procedures and monitoring requirements.

* * * * *

(g) * * *

(9) Continuous compliance requirements. You must demonstrate continuous compliance with the emissions standards and operating limits by using the performance test methods and procedures in § 63.805 for each affected source.

(i) *General requirements.* (A) You must monitor and collect data, and provide a site specific monitoring plan as required by §§ 63.804, 63.806 and 63.807.

(B) Except for periods of monitoring system malfunctions, repairs associated with monitoring system malfunctions, and required monitoring system quality assurance or quality control activities (including, as applicable, calibration checks and required zero and span adjustments), you must operate the monitoring system and collect data at all required intervals at all times the affected source is operating and periods of malfunction. Any period for which data collection is required and the operation of the CEMS is not otherwise

exempt and for which the monitoring system is out-of-control and data are not available for required calculations constitutes a deviation from the monitoring requirements.

(C) You may not use data recorded during monitoring system malfunctions, repairs associated with monitoring system malfunctions, or required monitoring system quality assurance or control activities in calculations used to report emissions or operating levels. A monitoring system malfunction is any sudden, infrequent, not reasonably preventable failure of the monitoring system to provide valid data.

Monitoring system failures that are caused in part by poor maintenance or careless operation are not malfunctions. The owner or operator must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(ii) [Reserved]

(h) The owner or operator of an existing or new affected source subject to § 63.802(a)(4) or (b)(4) shall comply with those provisions by using either of the methods presented in § 63.804(h)(1) and (2).

(1) Calculate total formaldehyde emissions from all finishing materials and contact adhesives used at the facility using Equation 5 and maintain a value of F_{total} no more than 400 lb per rolling 12-month period.

$$F_{total} = (C_{f1}V_{c1} + C_{f2}V_{c2} + * * * + C_{fn}V_{cn} + G_{f1}V_{g1} + G_{f2}V_{g2} + * * * + G_{fn}V_{gn})$$

Equation 5

(2) Use a control system with an overall control efficiency (R) such that the calculated value of F_{total} in Equation 6 is no more than 400 lb per rolling 12-month period.

$$F_{total} = (C_{f1}V_{c1} + C_{f2}V_{c2} + * * * + C_{fn}V_{cn} + G_{f1}V_{g1} + G_{f2}V_{g2} + * * * + G_{fn}V_{gn}) * (1-R)$$

Equation 6

15. Section 63.805 is amended by adding paragraph (a)(1) to read as follows:

§ 63.805 Performance test methods.

(a)(1) * * *

(2) Performance tests shall be conducted under such conditions as the Administrator specifies to the owner or operator based on representative performance of the affected source for the period being tested. Upon request, the owner or operator shall make available to the Administrator such records as may be necessary to determine the conditions of performance tests.

* * * * *

16. Section 63.806 is amended by removing and reserving paragraph (e)(4)

and adding paragraphs (b)(4) and (k) to read as follows:

§ 63.806 Recordkeeping requirements.

* * * *

(b) * * *

(4) The formaldehyde content, in lb/gal, as applied, of each finishing material and contact adhesive subject to the emission limits in § 63.802.

* * * *

(k) The owner or operator of an affected source subject to this subpart shall maintain records of the occurrence and duration of each malfunction of operation (*i.e.*, process equipment) or the air pollution control equipment and monitoring equipment. The owner or operator shall maintain records of actions taken during periods of malfunction to minimize emissions in accordance with § 63.802(c), including corrective actions to restore malfunctioning process and air pollution control and monitoring equipment to its normal or usual manner of operation.

17. Section 63.807 is amended by revising paragraphs (c) introductory text and (c)(3) and the first sentence in paragraph (d) to read as follows:

§ 63.807 Reporting requirements.

* * * *

(c) The owner or operator of an affected source demonstrating compliance in accordance with § 63.804(g)(1), (2), (3), (5), (7), (8), and (h)(1) shall submit a report covering the previous six months of wood furniture manufacturing operations.

* * * *

(3) The semiannual reports shall include the information required by § 63.804(g)(1), (2), (3), (5), (7), (8), and (h)(1), a statement of whether the affected source was in compliance or noncompliance, and, if the affected source was in noncompliance, the measures taken to bring the affected source into compliance. If there was a malfunction during the reporting period, the report shall also include the number, duration, and a brief description for each type of malfunction which occurred during the reporting period and which caused or may have caused any applicable emission limitation to be exceeded. The report must also include a description of actions taken by an owner or operator during a malfunction of an affected source to minimize emissions in accordance with § 63.802(c), including actions taken to correct a malfunction.

* * * *

(d) The owner or operator of an affected source demonstrating

compliance in accordance with § 63.804(g)(4), (6), and (h)(2) of this subpart shall submit the excess emissions and continuous monitoring system performance report and summary report required by § 63.10(e) of subpart A. * * *

* * * *

Subpart JJ [Amended]

18. Table 1 to Subpart JJ of part 63 is amended:

- a. By removing entry 63.6(e)(1);
 - b. By adding entries 63.6(e)(1)(i), 63.6(e)(1)(ii), 63.6(e)(1)(iii);
 - c. By revising entries 63.6(e)(2) and (3);
 - d. By removing entries 63.7 and 63.8;
 - e. By adding entries 63.7(a)–(d), 63.7(e)(1), 63.7(e)(2)–(e)(4), 63.8(a)–(b), 63.8(c)(1)(i), 63.8(c)(1)(ii), 63.8(c)(1)(iii), 63.8(c)(2)–(d)(2), 63.8(d)(3), and 63.8(e)–(f);
 - f. By removing entry 63.10(b)(2);
 - g. By adding entries 63.10(b)(2)(i), 63.10(b)(2)(ii), 63.10(b)(2)(iii), 63.10(b)(2)(iv)–(b)(2)(v), 63.10(b)(2)(vi)–(b)(2)(xiv);
 - h. By removing entry 63.10(c);
 - i. By adding entries 63.10(c)(1)–(9), 63.10(c)(10)–(11), 63.10(c)(12)–(c)(14), and 63.10(c)(15); and
 - j. By revising entry 63.10(d)(5).
- The revisions read as follows:

TABLE 1 TO SUBPART JJ OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART JJ

Reference	Applies to subpart JJ	Comment
63.6(e)(1)(i)	No	See 63.802(c) for general duty requirement.
63.6(e)(1)(ii)	No	
63.6(e)(1)(iii)	Yes	
63.6(e)(2)	No	Section reserved.
63.6(e)(3)	No	
63.6(f)(1)	No	
§ 63.7(a)–(d)	Yes	Applies only to affected sources using a control device to comply with the rule.
§ 63.7(e)(1)	No	See 63.805(a)(1).
§ 63.7(e)(2)–(e)(4)	Yes	Applies only to affected sources using a control device to comply with the rule.
63.8(a)–(b)	Yes	Applies only to affected sources using a control device to comply with the rule.
63.8(c)(1)(i)	No	
63.8(c)(1)(ii)	Yes	Applies only to affected sources using a control device to comply with the rule.
63.8(c)(1)(iii)	No	
63.8(c)(2)–(d)(2)	Yes	Applies only to affected sources using a control device to comply with the rule.
63.8(d)(3)	Yes, except for last sentence.	Applies only to affected sources using a control device to comply with the rule.
63.8(e)–(g)	Yes	Applies only to affected sources using a control device to comply with the rule.
63.10(b)(2)(i)	No	

TABLE 1 TO SUBPART JJ OF PART 63—GENERAL PROVISIONS APPLICABILITY TO SUBPART JJ—Continued

Reference	Applies to subpart JJ	Comment
63.10(b)(2)(ii)	No	See 63.806(k) for recordkeeping of occurrence and duration of malfunctions and recordkeeping of actions taken during malfunction.
63.10(b)(2)(iii)	Yes	Applies only to affected sources using a control device to comply with the rule.
63.10(b)(2)(iv)–(b)(2)(v)	No	
63.10(b)(2)(vi)–(b)(2)(xiv)	Yes	Applies only to affected sources using a control device to comply with the rule.
* * *	* * *	* * *
63.10(c)(1)–(9)	Yes	
63.10(c)(10)–(11)	No	See 63.806(k) for recordkeeping of malfunctions.
63.10(c)(12)–(c)(14)	Yes	
63.10(c)(15)	No	
* * *	* * *	* * *
63.10(d)(5)	No	See 63.807(c)(3) for reporting of malfunctions.
* * *	* * *	* * *

19. Table 3 to Subpart JJ of part 63 is amended by adding entry (e) under “Finishing Operations” to read as follows:

TABLE 3 TO SUBPART JJ OF PART 63—SUMMARY OF EMISSION LIMITS

Emission point	Existing source	New source
(e) Achieve total free formaldehyde emissions across all finishing operations and contact adhesives, lb per rolling 12-month period, as applied	400	400
* * *	* * *	* * *

Table 5 to Subpart JJ of Part 63 [Amended]

20. Table 5 to Subpart JJ of part 63 is amended by removing the entry for “Formaldehyde.”

[FR Doc. 2010–31091 Filed 12–20–10; 8:45 am]

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Federal Register

**Tuesday,
December 21, 2010**

Part V

Department of Commerce

**National Oceanic and Atmospheric
Administration**

50 CFR Part 217

**Taking and Importing Marine Mammals;
Taking Marine Mammals Incidental to
Operation and Maintenance of a
Liquefied Natural Gas Facility Off
Massachusetts; Proposed Rule**

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 0808041026–9015–01]

RIN 0648–AX09

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Operation and Maintenance of a Liquefied Natural Gas Facility Off Massachusetts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from Neptune LNG LLC (Neptune) for authorization for the take of marine mammals, by harassment, incidental to port commissioning and operations, including maintenance and repair activities, at its Neptune Deepwater Port (the Port) in Massachusetts Bay for the period of July 2011 through July 2016. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requests information, suggestions, and comments on these proposed regulations.

DATES: Comments and information must be received no later than February 4, 2011.

ADDRESSES: You may submit comments, identified by 0648–AX09, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>.
- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

Comments regarding any aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via one of the means stated here and to the Office of Information and Regulatory Affairs, NEOB–10202, Office of Management and Budget (OMB), Attn: Desk Office, Washington, DC 20503, OIRA@omb.eop.gov.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change.

All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, ext 156.

SUPPLEMENTARY INFORMATION:**Availability**

A copy of Neptune's application may be obtained by writing to the address specified above (*see ADDRESSES*), calling the contact listed above (*see FOR FURTHER INFORMATION CONTACT*), or visiting the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

The Final Environmental Impact Statement (Final EIS) on the Neptune Deepwater Port License Application authored by the Maritime Administration (MARAD) and U.S. Coast Guard (USCG) is available for viewing at <http://www.regulations.gov> by entering the search words "Neptune LNG."

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of

such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

Summary of Request

On December 14, 2009, NMFS received an application from Neptune for the taking, by harassment, of marine mammals incidental to port commissioning and operations, including maintenance and repair activities, at its Neptune Deepwater Port (Port) facility in Massachusetts Bay. NMFS reviewed Neptune's application and identified a number of issues requiring further clarification. After addressing comments from NMFS, Neptune modified its application and submitted a revised application on March 11, 2010. The March 11, 2010, application is the one available for public comment (*see ADDRESSES*) and which was considered by NMFS for these proposed regulations.

Neptune submitted its first complete application to NMFS on December 27, 2007, for the take of small numbers of marine mammals, by harassment, incidental to the construction phase of the Neptune LNG Port Facility. In June 2008, NMFS issued a 1-year Incidental Harassment Authorization (IHA) to Neptune for the construction of the Port (73 FR 33400, June 12, 2008). This authorization expired on June 30, 2009. NMFS issued a second 1-year IHA to Neptune for the completion of construction and beginning of Port operations on June 26, 2009 (74 FR 31926, July 6, 2009), which expired on June 30, 2010.

On July 12, 2010, NMFS issued a third IHA to Neptune based on the request in its March 11, 2010, application (75 FR 41440, July 16, 2010). This latest IHA is effective through July 11, 2011. During the period of this third IHA, Neptune intends to commission its second shuttle and regasification vessel (SRV) and conduct limited port operations. There is also a

chance that some maintenance and repairs may be conducted on the Port facility.

During the period of these proposed regulations (July 2011–July 2016), Neptune intends to continue port operations and conduct maintenance and repairs, as needed. The Neptune Port is located approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 260 ft (79 m) in depth. The purpose of the Port is to import liquefied natural gas (LNG) into the New England region. Take of marine mammals may occur during port operations from thruster use during maneuvering of the SRVs while docking and undocking, occasional weathervaning (turning of a vessel at anchor from one direction to another under the influence of wind or currents) at the Port, and during thruster use of dynamic positioning (DP) maintenance vessels should a major repair be necessary. Neptune has requested an authorization to take 12 marine mammal species by Level B harassment. The species are: North Atlantic right whale; humpback whale; fin whale; sei whale; minke whale; long-finned pilot whale; Atlantic white-sided dolphin; harbor porpoise; common dolphin; Risso's dolphin; bottlenose dolphin; and harbor seal. In the 2009 and 2010 IHAs, NMFS also authorized take of killer whales and gray seals. NMFS has preliminarily determined that it would be appropriate in this proposed rule to authorize take, by Level B harassment only, incidental to operations and maintenance activities of these two species as well.

Description of the Specified Activity

On March 23, 2007, Neptune received a license from MARAD to own, construct, and operate a deepwater port. The Port, which is located in Massachusetts Bay, consists of a submerged buoy system to dock specifically designed LNG carriers approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 260 ft (79 m) in depth. The two buoys are separated from one another by a distance of approximately 2.1 mi (3.4 km). The locations of the Neptune Port and the associated pipeline are shown in Figure 2–1 in Neptune's application (*see ADDRESSES*).

All construction of the Neptune Port was completed in November 2009. The first SRV was commissioned in February–March 2010. Commissioning of the second SRV is scheduled to occur in early 2011 and so would occur under the current IHA. Between July 2011 and July 2016, (the requested time period for these proposed regulations), Neptune

plans to continue Port operations and also plans to conduct any necessary maintenance and repairs of the Port facility.

Neptune will be capable of mooring LNG SRVs with a capacity of approximately 183,113 cubic yards (yd³; 140,000 cubic meters (m³)). Up to two SRVs will temporarily moor at the Port by means of a submerged unloading buoy system. Two separate buoys will allow natural gas to be delivered in a continuous flow, without interruption, by having a brief overlap between arriving and departing SRVs. The annual average throughput capacity will be around 500 million standard cubic feet per day (mmscfd) with an initial throughput of 400 mmscfd and a peak capacity of approximately 750 mmscfd.

The SRVs will be equipped to store, transport, and vaporize LNG and to odorize, meter and send out natural gas by means of two 16-in (40.6-cm) flexible risers and one 24-in (61-cm) subsea flowline. These risers and flowline will lead to a 24-in (61-cm) gas transmission pipeline connecting the deepwater port to the existing 30-in (76.2-cm) Algonquin HublineSM (HublineSM) located approximately 9 mi (14.5 km) west of the Neptune deepwater port location. The Port will have an expected operating life of approximately 25 years. Figure 1–1 of Neptune's application shows an isometric view of the Port (*see ADDRESSES*). The following subsections describe the operational activities for the Port.

Description of Port Operations

During Neptune Port operations, sound will be generated by the regasification of the LNG aboard the SRVs and the use of thrusters by vessels maneuvering and maintaining position at the port. Large construction-type DP vessels used for major repairs of the subsea pipeline or unloading facility may be another potential sound source, although these types of repairs are unlikely to occur. Of these potential operations and maintenance/repair sound sources, thruster use for DP is the most significant. The following text describes the activities that will occur at the port upon its commissioning.

(1) Vessel Activity

The SRVs will approach the Port using the Boston Harbor Traffic Separation Scheme (TSS), entering the TSS within the Great South Channel (GSC) and remaining in the TSS until they reach the Boston Harbor Precautionary Area. At the Boston Lighted Horn Buoy B (at the center of the Boston Harbor Precautionary Area), the SRV will be met by a pilot vessel

and a support vessel. A pilot will board the SRV, and the support vessel will accompany the SRV to the port. SRVs carrying LNG typically travel at speeds up to 19.5 knots (36 km/hr); however, Neptune SRVs will reduce speed to 10 knots (18.5 km/hr) within the TSS year-round in the Off Race Point Seasonal Management Area (SMA) and will maintain a maximum of 10 knots (18.5 km/hr) when traveling to and from the buoys once exiting the shipping lanes at the Boston Harbor Precautionary Area. In addition, Neptune is committed to reducing speed to 10 knots (18.5 km/hr) in the GSC SMA from April 1 to July 31 each year.

To supply a continuous flow of natural gas into the pipeline, an average of about 50 roundtrip SRV transits will take place annually (one transit every 3.65 days). As an SRV approaches the Port, vessel speed will gradually be reduced. Upon arrival at the Port, one of the submerged unloading buoys will be located and retrieved from its submerged position by means of a winch and recovery line. The SRV is designed for operation in harsh environments and can connect to the unloading buoy in up to 11.5 ft (3.5 m) significant wave heights and remain operational in up to 36 ft (11 m) significant wave heights, providing high operational availability.

The vessel's aft/forward thrusters will be used intermittently. Neptune SRVs will use both bow and stern thrusters when approaching the unloading buoy and when docking the buoy inside the Submerged Turret Loading (STL) compartment, as well as when releasing the buoy after the regasifying process is finished. The thrusters will be energized for up to 2 hours during the docking process and up to 1 hour during the undocking/release process. When energized, the thrusters will rotate at a constant RPM with the blades set at zero pitch. There will be little cavitation when the thruster propellers idle in this mode. The sound levels in this operating mode are expected to be approximately 8 decibels (dB) less than at 100 percent load, based on measured data from other vessels.

When the thrusters are engaged, the pitch of the blades will be adjusted in short bursts for the amount of thrust needed. These short bursts will cause cavitation and elevated sound levels. The maximum sound level with two thrusters operating at 100 percent load will be 180 dB re 1 μ Pa at 1m. This is not the normal operating mode, but a worst-case scenario. Typically, thrusters are operated for only seconds at a time and not at continuous full loading. These thrusters will be engaged for no

more than 20 minutes, in total, when docking at the buoy. The same applies for the undocking scenario.

During normal conditions, the vessel will be allowed to weathervane on the single-point mooring system. However, aft thrusters may be used under certain conditions to maintain the vessel's heading into the wind when competing tides operate to push the vessel broadside to the wind. Neptune has assumed a total of 200 hr/yr operating under these conditions. In these circumstances, the ambient sound will already be high because of the wind and associated wave sound.

(2) Regasification System

Once an SRV is connected to a buoy, the vaporization of LNG and send-out of natural gas can begin. Each SRV will be equipped with three vaporization units, each with the capacity to vaporize 250 mmscfd. Under normal operation, two units will be in service simultaneously. The third vaporization unit will be on standby mode, although all three units could operate simultaneously.

(3) Maintenance and Repairs

Routine maintenance activities typically are short in duration (several days or less) and require small vessels (less than 300 gross tons) to perform. Activities include attaching and detaching and/or cleaning the buoy pick up line to the STL buoy, performing surveys and inspections with a remotely operated vehicle, and cleaning or replacing parts (*e.g.*, bulbs, batteries, etc.) on the floating navigation buoys. Every 7–10 years, Neptune will run an intelligent pig (a gauging/cleaning device) down the pipeline to assess its condition. This particular activity will require several larger, construction-type vessels and several weeks to complete.

Unplanned repairs can be either relatively minor, or in some cases, major, requiring several large, construction-type vessels and a mitigation program similar to that employed during the construction phase of the project. Minor repairs are typically shorter in duration and could include fixing flange or valve leaks, replacing faulty pressure transducers, or repairing a stuck valve. These kinds of repairs require one diver support vessel with three or four anchors to hold its position. Minor repairs could take from a few days to 1–2 weeks depending on the nature of the problem.

Major repairs are longer in duration and typically require large construction vessels similar to those used to install the pipeline and set the buoy and anchoring system. These vessels will typically mobilize from local ports or

the Gulf of Mexico. Major repairs require upfront planning, equipment procurement, and mobilization of vessels and saturation divers. Examples of major repairs—although unlikely to occur—include damage to a riser or umbilical and their possible replacement, damage to the pipeline and manifolds, or anchor chain replacement. These types of repairs could take 1–4 weeks and possibly longer.

Operations Sound

The acoustic effects of using the thrusters for maneuvering at the unloading buoys were modeled by JASCO Research Limited (2005). The analysis assumed the use of four thrusters (two bow, two stern) at 100 percent power during all four seasons. The one-third ($\frac{1}{3}$)-octave band source levels for the thrusters ranged from 148.5 dB re 1 μ Pa at 1 m at 2,000 Hertz (Hz) to 174.5 dB re 1 μ Pa at 1 m at 10 Hz. Figures 1–2 through 1–5 in Neptune's application show the received sound level at 164-ft (50-m) depth at the south unloading buoy during each of the four seasons.

The acoustic effects of operating the regasification system at the unloading buoys were also modeled by JASCO Research Limited (2005). In addition, supplemental analysis was performed to assess the potential underwater acoustic impacts of using the two aft thrusters after mooring for maintaining the heading of the vessel in situations when competing tides operate to push the vessel broadside to the wind. Additionally, Samsung performed an underwater noise study on the newly constructed SRV, and an evaluation of these data was performed by JASCO Applied Sciences. Additional details of all the modeling analyses can be found in Appendices B and C of Neptune's application (*see ADDRESSES*). The loudest source of sound during operations at the port will be the use of thrusters for dynamic positioning.

Maintenance/Repair Sound

Acoustic modeling originally performed to predict received levels of underwater sound that could result from the construction of Neptune also could be applicable to major maintenance/repair during operations (*see* Appendices B and C in Neptune's application for a discussion of the acoustic modeling methodology employed). Activities considered to be potential sound sources during major maintenance/repair activities include excavation (jetting) of the flowline or main transmission pipeline routes and lowering of materials (pipe, anchors,

and chains) to the sea floor. These analyses evaluated the potential impacts of construction of the flowline and pipeline using surrogate source levels for vessels that could be employed during Neptune's construction. One surrogate vessel used for modeling purposes was the *Castoro II* (and four accompanying vessels). Figures 1–6 and 1–7 in Neptune's application illustrate the worst-case received sound levels that would be associated with major maintenance/repair activities along the flowline between the two unloading buoys and along the pipeline route at the 164-ft (50-m) depth during the spring season if a vessel similar to the *Castoro II* were used.

Comments and Responses

On May 6, 2010, NMFS published a notice of a proposed IHA and a notice of receipt of an application for a Letter of Authorization (LOA) in the **Federal Register** (75 FR 24906) and requested comments and information from the public for 30 days. NMFS received only one comment letter from the Marine Mammal Commission (MMC). The MMC's comments noted the need for monitoring and mitigation and for the reinitiation of section 7 consultation under the Endangered Species Act (ESA). NMFS included the proposed monitoring and mitigation measures in the 2010 IHA and completed the required ESA section 7 consultation prior to issuance of the 2010 IHA. To see the full comments and responses, please refer to the IHA **Federal Register** notice of issuance (75 FR 41440, July 16, 2010).

Description of Marine Mammals in the Area of the Specified Activity

Massachusetts Bay (as well as the entire Atlantic Ocean) hosts a diverse assemblage of marine mammals, including the: North Atlantic right whale; blue whale; fin whale; sei whale; minke whale; humpback whale; killer whale; long-finned pilot whale; sperm whale; Atlantic white-beaked dolphin; Atlantic white-sided dolphin; bottlenose dolphin; common dolphin; harbor porpoise; Risso's dolphin; striped dolphin; gray seal; harbor seal; harp seal; and hooded seal. Table 3–1 in Neptune's application outlines the marine mammal species that occur in Massachusetts Bay and the likelihood of occurrence of each species. Of the species listed here, the North Atlantic right, blue, fin, sei, humpback, and sperm whales are all listed as endangered under the ESA and as depleted under the MMPA. The northern coastal stock of bottlenose dolphins is considered depleted under

the MMPA. Certain stocks or populations of killer whales are listed as endangered under the ESA or depleted under the MMPA; however, none of those stocks or populations occurs in the proposed activity area.

Of these species, 14 are expected to occur in the area of Neptune's proposed operations. These species include: The North Atlantic right, humpback, fin, sei, minke, killer, and long-finned pilot whales; Atlantic white-sided, common, Risso's, and bottlenose dolphins; harbor porpoise; and harbor and gray seals. Neptune used information from the Cetacean and Turtle Assessment Program (CETAP; 1982) and the U.S. Navy's Marine Resource Assessment (MRA) for the Northeast Operating Areas (DoN, 2005; available on the Internet at: https://portal.navfac.navy.mil/portal/page/portal/navfac/navfac_ww_pp/navfac_hq_pp/navfac_environmental/mra) to estimate densities of the species in the area. Nonetheless, NMFS used the data on cetacean distribution within Massachusetts Bay, such as those published by NOAA's National Centers for Coastal Ocean Science (NCCOS; 2006), to determine density estimates of several species of marine mammals in the vicinity of the project area. The explanation for those derivations and the actual density estimates are described later in this document (see the "Estimated Take by Incidental Harassment" section).

Blue and sperm whales are not commonly found in Massachusetts Bay. The sperm whale is generally a deepwater animal, and its distribution off the northeastern U.S. is concentrated around the 13,280-ft (4,048-m) depth contour, with sightings extending offshore beyond the 6,560-ft (2,000-m) depth contour. Sperm whales also can be seen in shallow water south of Cape Cod from May to November (CETAP, 1982). In the North Atlantic, blue whales are most commonly sighted in the waters off eastern Canada. Although they are rare in the shelf waters of the eastern U.S., occasional sightings of blue whales have been made off Cape Cod. Harp and hooded seals are seasonal visitors from much further north, seen mostly in the winter and early spring. Prior to 1990, harp and hooded seals were sighted only very occasionally in the Gulf of Maine, but recent sightings suggest increasing numbers of these species now visit these waters (Harris *et al.*, 2001, 2002). However, these harp seal sightings are considered extralimital (Waring *et al.*, 2009). While there have been some increased sightings of hooded seals off the east coast of the U.S., the

southernmost portion of their spring migration is considered the Gulf of St. Lawrence (Waring *et al.*, 2009). Therefore, their sightings in U.S. east coast waters are considered extralimital. Juveniles of a third seal species, the ringed seal, are seen on occasion as far south as Cape Cod in the winter, but this species is considered to be quite rare in these waters (Provincetown Center for Coastal Studies, 2005). Due to the rarity of these species in the proposed project area and the remote chance they would be affected by Neptune's proposed port operations, these species are not considered further in these proposed regulations.

In addition to the 16 cetacean species listed in Table 3–1 in Neptune's application, 10 other cetacean species have been recorded for Massachusetts as rare vagrants or from strandings (Cardoza *et al.*, 1999). The following six species of beaked whale are all pelagic and recorded mostly as strandings: the northern bottlenose whale; Cuvier's beaked whale; Sowerby's beaked whale; Blainville's beaked whale; Gervais' beaked whale; and True's beaked whale. Vagrants include the beluga whale, a northern species with rare vagrants reported as far south as Long Island (Katona *et al.*, 1993); the pantropical spotted dolphin and false killer whale, which are primarily tropical species with rare sightings in Massachusetts waters (Cardoza *et al.*, 1999); and the pygmy sperm whale, which is generally an offshore species that occasionally wanders inshore. There have been occasional sightings of striped dolphins in the waters of the northeastern U.S. However, the majority of these sightings occurred in waters deeper than those of the Neptune Port project area (Waring *et al.*, 2009). While some Atlantic white-beaked dolphins have been sighted in the western Gulf of Maine and off Cape Cod, their distribution in the area has been considered limited, mostly a factor of opportunistic feeding (Waring *et al.*, 2009). Due to the rarity of these species in the proposed project area and the remote chance they would be affected by Neptune's proposed port operations, these species are not considered further in these proposed regulations.

Information on those species that may be impacted by this activity is provided in Neptune's application and sections 3.2.3 and 3.2.5 in the MARAD/USCG Final EIS on the Neptune LNG proposal (see **ADDRESSES**). Please refer to those documents for more information on these species. In addition, general information on these marine mammal species can also be found in the 2009 NMFS U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment

Report (SAR; Waring *et al.*, 2009) and the 2010 Draft NMFS Atlantic and Gulf of Mexico Marine Mammal SAR (Waring *et al.*, in prep.), which are available on the Internet at: <http://www.nefsc.noaa.gov/publications/tm/tm213/> and <http://www.nmfs.noaa.gov/pr/sars/draft.htm>, respectively. A brief summary on several commonly sighted marine mammal species distribution and abundance in the vicinity of the action area is provided next.

Humpback Whale

The highest abundance for humpback whales is distributed primarily along a relatively narrow corridor following the 328-ft (100-m) isobath across the southern Gulf of Maine from the northwestern slope of Georges Bank, south to the GSC, and northward alongside Cape Cod to Stellwagen Bank and Jeffreys Ledge. The relative abundance of whales increases in the spring with the highest occurrence along the slope waters (between the 131- and 459-ft, 40- and 140-m, isobaths) off Cape Cod and Davis Bank, Stellwagen Basin and Tillies Basin and between the 164- and 656-ft (50- and 200-m) isobaths along the inner slope of Georges Bank. High abundance was also estimated for the waters around Platts Bank. In the summer months, abundance increases markedly over the shallow waters (< 164 ft, or < 50 m) of Stellwagen Bank, the waters (328–656 ft, 100–200 m) between Platts Bank and Jeffreys Ledge, the steep slopes (between the 98- and 525-ft isobaths, 30- and 160-m isobaths) of Phelps and Davis Bank north of the GSC towards Cape Cod, and between the 164- and 328-ft (50- and 100-m) isobath for almost the entire length of the steeply sloping northern edge of Georges Bank. This general distribution pattern persists in all seasons except winter when humpbacks remain at high abundance in only a few locations, including Porpoise and Neddick Basins adjacent to Jeffreys Ledge, northern Stellwagen Bank and Tillies Basin, and the GSC. The best estimate of abundance for Gulf of Maine, formerly western North Atlantic, humpback whales is 847 animals (Waring *et al.*, 2009). Current data suggest that the Gulf of Maine humpback whale stock is steadily increasing in size, which is consistent with an estimated average trend of 3.1 percent in the North Atlantic population overall for the period 1979–1993 (Stevick *et al.*, 2003, cited in Waring *et al.*, 2009).

Fin Whale

Spatial patterns of habitat utilization by fin whales are very similar to those of humpback whales. Spring and

summer high-use areas follow the 328-ft (100-m) isobath along the northern edge of Georges Bank (between the 164- and 656-ft, 50- and 200-m, isobaths), and northward from the GSC (between the 164- and 525-ft, 50- and 160-m, isobaths). Waters around Cashes Ledge, Platts Bank, and Jeffreys Ledge are all high-use areas in the summer months. Stellwagen Bank is a high-use area for fin whales in all seasons, with highest abundance occurring over the southern Stellwagen Bank in the summer months. In fact, the southern portion of Stellwagen Bank National Marine Sanctuary (SBNMS) is used more frequently than the northern portion in all months except winter, when high abundance is recorded over the northern tip of Stellwagen Bank. In addition to Stellwagen Bank, high abundance in winter is estimated for Jeffreys Ledge and the adjacent Porpoise Basin (328- to 525-ft, isobaths), as well as Georges Basin and northern Georges Bank. The best estimate of abundance for the western North Atlantic stock of fin whales is 3,985, which is the sum of the estimate derived from an August 2006 Gulf of Maine survey and the sum of the estimate derived from a July–August 2007 northern Labrador to Scotian Shelf survey (Waring *et al.*, in prep.). Currently, there are insufficient data to determine population trends for this species.

Minke Whale

Like other piscivorous baleen whales, the highest abundance for minke whale is strongly associated with regions between the 164- and 328-ft (50- and 100-m) isobaths, but with a slightly stronger preference for the shallower waters along the slopes of Davis Bank, Phelps Bank, GSC, and Georges Shoals on Georges Bank. Minke whales are sighted in SBNMS in all seasons, with highest abundance estimated for the shallow waters (approximately 131 ft, 40 m) over southern Stellwagen Bank in the summer and fall months. Platts Bank, Cashes Ledge, Jeffreys Ledge, and the adjacent basins (Neddick, Porpoise, and Scantium) also support high relative abundance. Very low densities of minke whales remain throughout most of the southern Gulf of Maine in winter. The best estimate of abundance for the Canadian East Coast stock of minke whales, which occurs from the western half of the Davis Strait to the Gulf of Mexico, is 8,987 animals, which is the sum of the estimate derived from an August 2006 Gulf of Maine survey and the sum of the estimate derived from a July–August 2007 northern Labrador to Scotian Shelf survey (Waring *et al.*, in prep.). A population

trend analysis for this species has not been conducted (Waring *et al.*, in prep.).

North Atlantic Right Whale

North Atlantic right whales are generally distributed widely across the southern Gulf of Maine in spring with highest abundance located over the deeper waters (328- to 525-ft, 100- to 160-m, isobaths) on the northern edge of the GSC and deep waters (328–984 ft 100–300 m) parallel to the 328-ft (100-m) isobath of northern Georges Bank and Georges Basin. High abundance was also found in the shallowest waters (< 98 ft, <30 m) of Cape Cod Bay (CCB), over Platts Bank and around Cashes Ledge. Lower relative abundance is estimated over deep-water basins including Wilkinson Basin, Rodgers Basin, and Franklin Basin. In the summer months, right whales move almost entirely away from the coast to deep waters over basins in the central Gulf of Maine (Wilkinson Basin, Cashes Basin between the 525- and 656-ft, 160- and 200-m, isobaths) and north of Georges Bank (Rogers, Crowell, and Georges Basins). Highest abundance is found north of the 328-ft (100-m isobath) at the GSC and over the deep slope waters and basins along the northern edge of Georges Bank. The waters between Fippennies Ledge and Cashes Ledge are also estimated as high-use areas. In the fall months, right whales are sighted infrequently in the Gulf of Maine, with highest densities over Jeffreys Ledge and over deeper waters near Cashes Ledge and Wilkinson Basin. In winter, CCB, Scantium Basin, Jeffreys Ledge, and Cashes Ledge are the main high-use areas. Although SBNMS does not appear to support the highest abundance of right whales, sightings within SBNMS are reported for all four seasons, albeit at low relative abundance. The highest rate of sighting within SBNMS occurs along the southern edge of the Bank.

The western North Atlantic population size was estimated to be at least 361 individuals in 2005 based on a census of individual whales identified using photo-identification techniques (Waring *et al.*, in prep.). This value is a minimum and does not include animals that were alive prior to 2005 but not recorded in the individual sightings database as seen from December 1, 2004, to June 24, 2009. It also does not include some calves known to be born during 2005 or any other individual whale seen during 2005 but not yet entered into the catalog (Waring *et al.*, in prep.). Examination of the minimum number alive population index calculated from the individual sightings database, as it existed on June 24, 2009, for the years

1990–2005 suggests a positive trend in population size. These data reveal a significant increase in the number of catalogued whales alive during this period but with significant variation due to apparent losses exceeding gains during 1998–1999. Mean growth rate for the period 1990–2005 was 2.1 percent (Waring *et al.*, in prep.).

Long-finned Pilot Whale

The long-finned pilot whale is more generally found along the edge of the continental shelf (a depth of 328 to 3,280 ft, or 100 to 1,000 m), choosing areas of high relief or submerged banks in cold or temperate shoreline waters. This species is split into two subspecies: the Northern and Southern subspecies. The Southern subspecies is circumpolar with northern limits of Brazil and South Africa. The Northern subspecies, which could be encountered during operation of the Neptune Port facility, ranges from North Carolina to Greenland (Reeves *et al.*, 2002; Wilson and Ruff, 1999). In the western North Atlantic, long-finned pilot whales are pelagic, occurring in especially high densities in winter and spring over the continental slope, then moving inshore and onto the shelf in summer and autumn following squid and mackerel populations (Reeves *et al.*, 2002). They frequently travel into the central and northern Georges Bank, GSC, and Gulf of Maine areas during the summer and early fall (May and October; NOAA, 1993). The best population estimate for the western North Atlantic stock of long-finned pilot whale is 12,619 individuals (Waring *et al.*, in prep.). Currently, there are insufficient data to determine population trends for the long-finned pilot whale.

Sei Whale

The sei whale is the least likely of all the baleen whale species to occur near the Neptune Port. However, there were a couple of sightings in the general vicinity of the port facility during the construction phase (Neptune Marine Mammal Monitoring Weekly Reports, 2008). The Nova Scotia stock of sei whales ranges from the continental shelf waters of the northeastern U.S. and extends northeastward to south of Newfoundland. The southern portion of the species range during spring and summer includes the northern portions of the U.S. Atlantic Exclusive Economic Zone (i.e., the Gulf of Maine and Georges Bank). Sei whales are most abundant in U.S. waters during the spring, with sightings concentrated along the eastern margin of Georges Bank and into the Northeast Channel area and along the southwestern edge of

Georges Bank in the area of Hydrographer Canyon (CETAP, 1982). The best estimate of abundance for this stock is 386 animals (Waring *et al.*, 2009). A population trend analysis has not been done for this species.

Atlantic White-Sided Dolphin

In spring, summer and fall, Atlantic white-sided dolphins are widespread throughout the southern Gulf of Maine, with the high-use areas widely located on either side of the 328-ft (100-m) isobath along the northern edge of Georges Bank, and north from the GSC to Stellwagen Bank, Jeffreys Ledge, Platts Bank, and Cashes Ledge. In spring, high-use areas exist in the GSC, northern Georges Bank, the steeply sloping edge of Davis Bank, Cape Cod, southern Stellwagen Bank, and the waters between Jeffreys Ledge and Platts Bank. In summer, there is a shift and expansion of habitat toward the east and northeast. High-use areas occur along most of the northern edge of Georges Bank between the 164- and 656-ft (50- and 200-m) isobaths and northward from the GSC along the slopes of Davis Bank and Cape Cod. High sightings are also recorded over Truxton Swell, Wilkinson Basin, Cashes Ledge and the bathymetrically complex area northeast of Platts Bank. High numbers of sightings of white-sided dolphin are recorded within SBNMS in all seasons, with highest density in summer, and the most widespread distribution in spring is located mainly over the southern end of Stellwagen Bank. In winter, high sightings were recorded at the northern tip of Stellwagen Bank and Tillies Basin.

A comparison of spatial distribution patterns for all baleen whales and all porpoises and dolphins combined showed that both groups have very similar spatial patterns of high- and low-use areas. The baleen whales, whether piscivorous or planktivorous, are more concentrated than the dolphins and porpoises. They utilize a corridor that extends broadly along the most linear and steeply sloping edges in the southern Gulf of Maine indicated broadly by the 328-ft (100-m) isobath. Stellwagen Bank and Jeffreys Ledge support a high abundance of baleen whales throughout the year. Species richness maps indicate that high-use areas for individual whales and dolphin species co-occurred, resulting in similar patterns of species richness primarily along the southern portion of the 328-ft (100-m) isobath extending northeast and northwest from the GSC. The southern edge of Stellwagen Bank and the waters around the northern tip of Cape Cod are also highlighted as

supporting high cetacean species richness. Intermediate to high numbers of species are also calculated for the waters surrounding Jeffreys Ledge, the entire Stellwagen Bank, Platts Bank, Fippennies Ledge, and Cashes Ledge. The best estimate of abundance for the western North Atlantic stock of white-sided dolphins is 63,368 (Waring *et al.*, 2009). A trend analysis has not been conducted for this species.

Killer Whale, Common Dolphin, Bottlenose Dolphin, Risso's Dolphin, and Harbor Porpoise

Although these five species are some of the most widely distributed small cetacean species in the world (Jefferson *et al.*, 1993), they are not commonly seen in the vicinity of the project area in Massachusetts Bay (Wiley *et al.*, 1994; NCCOS, 2006; Northeast Gateway Marine Mammal Monitoring Weekly Reports, 2007; Neptune Marine Mammal Monitoring Weekly Reports, 2008). The total number of killer whales off the eastern U.S. coast is unknown, and present data are insufficient to calculate a minimum population estimate or to determine the population trends for this stock (Blaylock *et al.*, 1995). The best estimate of abundance for the western North Atlantic stock of common dolphins is 120,743 animals, and a trend analysis has not been conducted for this species (Waring *et al.*, 2007). There are several stocks of bottlenose dolphins found along the eastern U.S. from Maine to Florida. The stock that may occur in the area of the Neptune Port is the western North Atlantic coastal northern migratory stock of bottlenose dolphins. The best estimate of abundance for this stock is 9,604 animals (Waring *et al.*, in prep.). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the western North Atlantic stock of Risso's dolphins is 20,479 animals (Waring *et al.*, 2009). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the Gulf of Maine/Bay of Fundy stock of harbor porpoise is 89,054 animals (Waring *et al.*, 2009). A trend analysis has not been conducted for this species.

Harbor and Gray Seals

In the U.S. western North Atlantic, both harbor and gray seals are usually found from the coast of Maine south to southern New England and New York (Waring *et al.*, 2007).

Along the southern New England and New York coasts, harbor seals occur seasonally from September through late May (Schneider and Payne, 1983). In recent years, their seasonal interval

along the southern New England to New Jersey coasts has increased (deHart, 2002). In U.S. waters, harbor seal breeding and pupping normally occur in waters north of the New Hampshire/Maine border, although breeding has occurred as far south as Cape Cod in the early part of the 20th century (Temte *et al.*, 1991; Katona *et al.*, 1993). Between 1981 and 2001, the uncorrected counts of seals increased from 10,543 to 38,014, an annual rate of 6.6 percent (Gilbert *et al.*, 2005, cited in Waring *et al.*, 2009). However, present data are insufficient to calculate a minimum population estimate for this stock or to determine a population trend for this stock (Waring *et al.*, in prep.).

Although gray seals are often seen off the coast from New England to Labrador, within U.S. waters, only small numbers of gray seals have been observed pupping on several isolated islands along the Maine coast and in Nantucket-Vineyard Sound, Massachusetts (Katona *et al.*, 1993; Rough, 1995). In the late 1990s, a year-round breeding population of approximately 400 gray seals was documented on outer Cape Cod and Muskeget Island (Waring *et al.*, 2007). Depending on the model used, the minimum estimate for the Canadian gray seal population ranged between 125,541 and 169,064 animals (Trzcinski *et al.*, 2005, cited in Waring *et al.*, 2009); however, present data are insufficient to calculate the minimum population estimate for U.S. waters. Waring *et al.* (2009) note that gray seal abundance in the U.S. Atlantic is likely increasing, but the rate of increase is unknown.

Brief Background on Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data, Southall *et al.* (2007) designate "functional hearing groups" for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): functional

hearing is estimated to occur between approximately 7 Hz and 22 kHz;

- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;

- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): functional hearing is estimated to occur between approximately 200 Hz and 180 kHz; and

- Pinnipeds in Water: functional hearing is estimated to occur between approximately 75 Hz and 75 kHz, with the greatest sensitivity between approximately 700 Hz and 20 kHz.

As mentioned previously in this document, 14 marine mammal species (12 cetacean and two pinniped species) are likely to occur in the Neptune Port area. Of the 12 cetacean species likely to occur in Neptune's project area, five are classified as low frequency cetaceans (*i.e.*, North Atlantic right, humpback, fin, minke, and sei whales), six are classified as mid-frequency cetaceans (*i.e.*, killer and pilot whales and bottlenose, common, Risso's, and Atlantic white-sided dolphins), and one is classified as a high-frequency cetacean (*i.e.*, harbor porpoise) (Southall *et al.*, 2007).

Potential Effects of the Specified Activity on Marine Mammals

Potential effects of Neptune's proposed port operations and maintenance/repair activities would most likely be acoustic in nature. LNG port operations and maintenance/repair activities introduce sound into the marine environment. Potential acoustic effects on marine mammals relate to sound produced by thrusters during maneuvering of the SRVs while docking and undocking, occasional weathervaning at the port, and during thruster use of DP maintenance vessels should a major repair be necessary. The potential effects of sound from the proposed activities associated with the Neptune Port might include one or more of the following: Tolerance; masking of natural sounds; behavioral disturbance; non-auditory physical effects; and, at least in theory, temporary or permanent hearing impairment (Richardson *et al.*, 1995). However, for reasons discussed later in this document, it is unlikely that there would be any cases of temporary, or especially permanent, hearing impairment resulting from these activities. As outlined in previous NMFS documents, the effects of noise

on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

- (1) The noise may be too weak to be heard at the location of the animal (*i.e.*, lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

- (2) The noise may be audible but not strong enough to elicit any overt behavioral response;

- (3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

- (4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

- (5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

- (6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

- (7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Tolerance

Numerous studies have shown that underwater sounds from industry activities are often readily detectable by marine mammals in the water at distances of many kilometers.

Numerous studies have also shown that marine mammals at distances more than a few kilometers away often show no apparent response to industry activities of various types (Miller *et al.*, 2005).

This is often true even in cases when the sounds must be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to underwater sound such as airgun pulses or vessels under some conditions, at other times, mammals of all three types have shown no overt reactions (*e.g.*, Malme *et al.*, 1986; Richardson *et al.*, 1995; Madsen and Muhl, 2000; Croll *et al.*, 2001; Jacobs and Terhune, 2002; Madsen *et al.*, 2002; Miller *et al.*, 2005). In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to some types of underwater sound than are baleen whales. Richardson *et al.* (1995) found that vessel noise does not seem to strongly affect pinnipeds that are already in the water. Richardson *et al.* (1995) went on to explain that seals on haul-outs sometimes respond strongly to the presence of vessels and at other times appear to show considerable tolerance of vessels, and Brueggeman *et al.* (1992; cited in Richardson *et al.*, 1995) observed ringed seals hauled out on ice pans displaying short-term escape reactions when a ship approached within 0.16–0.31 mi (0.25–0.5 km).

Masking

Masking is the obscuring of sounds of interest by other sounds, often at similar frequencies. Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.*, 1995). Background noise also can

include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high (e.g., on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked. Ambient noise is highly variable on continental shelves (Thompson, 1965; Myrberg, 1978; Chapman *et al.*, 1998; Desharnais *et al.*, 1999). This inevitably results in a high degree of variability in the range at which marine mammals can detect anthropogenic sounds.

Although masking is a natural phenomenon to which marine mammals must adapt, the introduction of strong sounds into the sea at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. For example, if a baleen whale is exposed to continuous low-frequency noise from an industrial source, this will reduce the size of the area around that whale within which it can hear the calls of another whale. In general, little is known about the importance to marine mammals of detecting sounds from conspecifics, predators, prey, or other natural sources. In the absence of much information about the importance of detecting these natural sounds, it is not possible to predict the impacts if marine mammals are unable to hear these sounds as often, or from as far away, because of masking by industrial noise (Richardson *et al.*, 1995). In general, masking effects are expected to be less severe when sounds are transient than when they are continuous.

Although some degree of masking is inevitable when high levels of manmade broadband sounds are introduced into the sea, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). The components of background noise that are similar in frequency to the sound signal in question primarily determine the degree of masking of that signal. Low-frequency industrial noise, such as shipping, has little or no masking effect on high frequency echolocation sounds.

Redundancy and context can also facilitate detection of weak signals.

These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.*, 1995). The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.*, 1986; Dubrovskiy, 1990; Bain *et al.*, 1993; Bain and Dahlheim, 1994). Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.*, 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.*, 1999). A few marine mammal species are known to increase the source levels of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.*, 1999; Terhune, 1999).

These data demonstrating adaptations for reduced masking pertain mainly to the very high frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.*, 1995). This ability may be useful in reducing masking at

these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies. For higher frequencies, such as that used in echolocation by toothed whales, several mechanisms are available that may allow them to reduce the effects of such masking.

Disturbance

Disturbance can induce a variety of effects, such as subtle changes in behavior, more conspicuous dramatic changes in activities, and displacement. Disturbance is one of the main concerns of the potential impacts of manmade noise on marine mammals. For many species and situations, there is no detailed information about reactions to noise. While there are no specific studies available on the reactions of marine mammals to sounds produced by a LNG facility, information from studies of marine mammal reactions to other types of continuous and transient anthropogenic sound (e.g., drillships) are described here as a proxy.

Behavioral reactions of marine mammals to sound are difficult to predict because they are dependent on numerous factors, including species, state of maturity, experience, current activity, reproductive state, time of day, and weather. If a marine mammal does react to an underwater sound by changing its behavior or moving a small distance, the impacts of that change may not be important to the individual, the stock, or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on the animals could be important. Based on the literature reviewed in Richardson *et al.* (1995), it is apparent that most small and medium-sized toothed whales exposed to prolonged or repeated underwater sounds are unlikely to be displaced unless the overall received level is at least 140 dB re 1 μ Pa (rms). The limited available data indicate that the sperm whale is sometimes, though not always, more responsive to underwater sounds than other toothed whales. Baleen whales probably have better hearing sensitivities at lower sound frequencies, and in several studies have been shown to react to continuous sounds at received sound levels of approximately 120 dB re 1 μ Pa (rms). Toothed whales appear to exhibit a greater variety of reactions to manmade underwater noise than do baleen whales. Toothed whale reactions can vary from approaching

vessels (e.g., to bow ride) to strong avoidance, while baleen whale reactions range from neutral (little or no change in behavior) to strong avoidance. In general, pinnipeds seem more tolerant of, or at least habituate more quickly to, potentially disturbing underwater noise than do cetaceans.

Baleen Whales—Baleen whales sometimes show behavioral changes in response to received broadband drillship noises of 120 dB (rms) or greater. On their summer range in the Beaufort Sea, bowhead whales (a species closely related to the right whale) were observed reacting to drillship noises within 2.5–5 mi (4–8 km) of the drillship at received levels 20 dB above ambient, or about 118 dB (Richardson *et al.*, 1990). Reactions were stronger at the onset of the sound (Richardson *et al.*, 1995). Migrating bowhead whales avoided an area with a radius of 6.2–12.4 mi (10–20 km around drillships and their associated support vessels, corresponding to a received noise level around 115 dB (Greene, 1987; Koski and Johnson, 1987; Hall *et al.*, 1994; Davies, 1997; Schick and Urban, 2000). For gray whales off California, the predicted reaction zone around a semi-submersible drill rig was less than 0.62 mi (1 km), at received levels of approximately 120 dB (Malme *et al.*, 1983, 1984). Humpback whales showed no obvious avoidance response to broadband drillship noises at a received level of 116 dB (Malme *et al.*, 1985).

Reactions of baleen whales to boat noises include changes in swimming direction and speed, blow rate, and the frequency and kinds of vocalizations (Richardson *et al.*, 1995). Baleen whales, especially minke whales, occasionally approach stationary or slow-moving boats, but more commonly avoid boats. Avoidance is strongest when boats approach directly or when vessel noise changes abruptly (Watkins, 1986; Beach and Weinrich, 1989). Humpback whales responded to boats at distances of at least 0.31–0.62 mi (0.5–1 km), and avoidance and other reactions have been noted in several areas at distances of several kilometers (Jurasz and Jurasz, 1979; Dean *et al.*, 1985; Bauer, 1986; Bauer and Herman, 1986).

During some activities and at some locations, humpbacks exhibit little or no reaction to boats (Watkins, 1986). Some baleen whales seem to show habituation to frequent boat traffic. Over 25 years of observations in Cape Cod waters, minke whales' reactions to boats changed from frequent positive interactions (*i.e.*, reactions of apparent curiosity or reactions that appeared to provide some reward to the animal) to a general lack

of interest (*i.e.*, ignored the stimuli), while humpback whales' reactions changed from being often negative to being often positive, and fin whales' reactions changed from being mostly negative (*i.e.*, sudden changes from activity to inactivity or a display of agonistic responses) to being mostly uninterested (Watkins, 1986).

North Atlantic right whales also display variable responses to boats. There may be an initial orientation away from a boat, followed by a lack of observable reaction (Atkins and Swartz, 1989). A slowly moving boat can approach a right whale, but an abrupt change in course or engine speed usually elicits a reaction (Goodyear, 1989; Mayo and Marx, 1990; Gaskin, 1991). When approached by a boat, right whale mothers will interpose themselves between the vessel and calf and will maintain a low profile (Richardson *et al.*, 1995). In a long-term study of baleen whale reactions to boats, while other baleen whale species appeared to habituate to boat presence over the 25-year period, right whales continued to show either uninterested or negative reactions to boats with no change over time (Watkins, 1986).

Biassoni *et al.* (2000) and Miller *et al.* (2000) reported behavioral observations for humpback whales exposed to a low-frequency sonar stimulus (160- to 330-Hz frequency band; 42-s tonal signal repeated every 6 min; source levels 170 to 200 dB) during playback experiments. Exposure to measured received levels ranging from 120 to 150 dB resulted in variability in humpback singing behavior. Croll *et al.* (2001) investigated responses of foraging fin and blue whales to the same low frequency active sonar stimulus off southern California. Playbacks and control intervals with no transmission were used to investigate behavior and distribution on time scales of several weeks and spatial scales of tens of kilometers. The general conclusion was that whales remained feeding within a region for which 12 to 30 percent of exposures exceeded 140 dB.

Frankel and Clark (1998) conducted playback experiments with wintering humpback whales using a single speaker producing a low-frequency “M-sequence” (sine wave with multiple-phase reversals) signal in the 60 to 90 Hz band with output of 172 dB at 1 m. For 11 playbacks, exposures were between 120 and 130 dB re 1 μ Pa (rms) and included sufficient information regarding individual responses. During eight of the trials, there were no measurable differences in tracks or bearings relative to control conditions, whereas on three occasions, whales

either moved slightly away from ($n = 1$) or towards ($n = 2$) the playback speaker during exposure. The presence of the source vessel itself had a greater effect than did the M-sequence playback.

Finally, Nowacek *et al.* (2004) used controlled exposures to demonstrate behavioral reactions of North Atlantic right whales to various non-pulse sounds. Playback stimuli included ship noise, social sounds of conspecifics, and a complex, 18-min “alert” sound consisting of repetitions of three different artificial signals. Ten whales were tagged with calibrated instruments that measured received sound characteristics and concurrent animal movements in three dimensions. Five out of six exposed whales reacted strongly to alert signals at measured received levels between 130 and 150 dB (*i.e.*, ceased foraging and swam rapidly to the surface). Two of these individuals were not exposed to ship noise, and the other four were exposed to both stimuli. These whales reacted mildly to conspecific signals. Seven whales, including the four exposed to the alert stimulus, had no measurable response to either ship sounds or actual vessel noise.

Odontocetes—In reviewing responses of cetaceans with best hearing (lowest auditory thresholds) in mid-frequency ranges, which includes toothed whales, Southall *et al.* (2007) reported that combined field and laboratory data for mid-frequency cetaceans exposed to non-pulse sounds did not lead to a clear conclusion about received levels coincident with various behavioral responses. In some settings, individuals in the field showed profound (significant) behavioral responses to exposures from 90 to 120 dB, while others failed to exhibit such responses for exposure to received levels from 120 to 150 dB. Contextual variables other than exposure received level, and probable species differences, are the likely reasons for this variability. Context, including the fact that captive subjects were often directly reinforced with food for tolerating noise exposure, may also explain why there was great disparity in results from field and laboratory conditions—exposures in captive settings generally exceeded 170 dB before inducing behavioral responses.

Dolphins and other toothed whales may show considerable tolerance of floating and bottom-founded drill rigs and their support vessels. Kapel (1979) reported many pilot whales within visual range of drillships and their support vessels off West Greenland. Beluga whales have been observed swimming within 328–492 ft (100–150

m) of an artificial island while drilling was underway (Fraker and Fraker, 1979, 1981) and within 1 mi (1.6 km) of the drillship *Explorer I* while the vessel was engaged in active drilling (Fraker and Fraker, 1981). Some belugas in Bristol Bay and Beaufort Sea, Alaska, when exposed to playbacks of drilling sounds, altered course to swim around the source, increased swimming speed, or reversed direction of travel (Stewart *et al.*, 1982; Richardson *et al.*, 1995). Reactions of beluga whales to semi-submersible drillship noise were less pronounced than were their reactions to motorboats with outboard engines. Captive belugas exposed to playbacks of recorded semi-submersible noise seemed quite tolerant of that sound (Thomas *et al.*, 1990).

Morton and Symonds (2002) used census data on killer whales in British Columbia to evaluate avoidance of non-pulse acoustic harassment devices (AHDs). Avoidance ranges around the AHDs were about 2.5 mi (4 km). Also, there was a dramatic reduction in the number of days "resident" killer whales were sighted during AHD-active periods compared to pre- and post-exposure periods and a nearby control site.

Harbor porpoises off Vancouver Island, British Columbia, were found to be sensitive to the simulated sound of a 2-megawatt offshore wind turbine (Koschinski *et al.*, 2003). The porpoises remained significantly further away from the sound source when it was active, and this effect was seen out to a distance of 197 ft (60 m). The device used in that study produced sounds in the frequency range of 30 to 800 Hz, with peak source levels of 128 dB re 1 μ Pa at 1 m at the 80- and 160-Hz frequencies.

Some species of small toothed cetaceans avoid boats when they are approached to within 0.31–0.93 mi (0.5–1.5 km), with occasional reports of avoidance at greater distances (Richardson *et al.*, 1995). Some toothed whale species appear to be more responsive than others. Beaked whales and beluga whales seem especially responsive to boats. Dolphins may tolerate boats of all sizes, often approaching and riding the bow and stern waves (Shane *et al.*, 1986). At other times, dolphin species that are known to be attracted to boats will avoid them. Such avoidance is often linked to previous boat-based harassment of the animals (Richardson *et al.*, 1995). Coastal bottlenose dolphins that are the object of whale-watching activities have been observed to swim erratically (Acevedo, 1991), remain submerged for longer periods of time (Janik and Thompson, 1996; Nowacek *et*

al., 2001), display less cohesiveness among group members (Cope *et al.*, 1999), whistle more frequently (Scarpaci *et al.*, 2000), and rest less often (Constantine *et al.*, 2004) when boats were nearby. Pantropical spotted dolphins and spinner dolphins in the eastern Tropical Pacific, where they have been targeted by the tuna fishing industry because of their association with these fish, display avoidance of survey vessels up to 11.1 km (6.9 mi; Au and Perryman, 1982; Hewitt, 1985), whereas spinner dolphins in the Gulf of Mexico were observed bow riding the survey vessel in all 14 sightings of this species during one survey (Wursig *et al.*, 1998).

Harbor porpoises tend to avoid boats. In the Bay of Fundy, Polacheck and Thorpe (1990) found harbor porpoises to be more likely to swim away from the transect line of their survey vessel than to swim toward it and more likely to head away from the vessel when they were within 1,312 ft (400 m). Similarly, off the west coast of North America, Barlow (1988) observed harbor porpoises avoiding a survey vessel by moving rapidly out of its path within 0.62 mi (1 km) of that vessel. Beluga whales are generally quite responsive to vessels. Belugas in Lancaster Sound in the Canadian Arctic showed dramatic reactions in response to icebreaking ships, with received levels of sound ranging from 101 dB to 136 dB re 1 μ Pa in the 20 to 1,000-Hz band at a depth of 66 ft (20 m; Finley *et al.*, 1990). Responses included emitting distinctive pulsive calls that were suggestive of excitement or alarm and rapid movement in what seemed to be a flight response. Reactions occurred out to 50 mi (80 km) from the ship. Another study found belugas to use higher-frequency calls, a greater redundancy in their calls (more calls emitted in a series), and a lower calling rate in the presence of vessels (Lesage *et al.*, 1999). The level of response of belugas to vessels is thought to be partly a function of habituation. Sperm whales generally show no overt reactions to vessels unless approached within several hundred meters (Watkins and Schevill, 1975; Wursig *et al.*, 1998; Magalhaes *et al.*, 2002). Observed reactions include spending more (Richter *et al.*, 2003) or less (Watkins and Schevill, 1975) time at the surface, increasing swimming speed, or changing heading (Papastavrou *et al.*, 1989; Richter *et al.*, 2003) and diving abruptly (Wursig *et al.*, 1998).

Pinnipeds—Pinnipeds generally seem to be less responsive to exposure to industrial sound than most cetaceans. Pinniped responses to underwater sound from some types of industrial

activities such as seismic exploration appear to be temporary and localized (Harris *et al.*, 2001; Reiser *et al.*, 2009).

Responses of pinnipeds to drilling noise have not been well studied. Richardson *et al.* (1995) summarizes the few available studies, which show ringed and bearded seals in the Arctic to be rather tolerant of drilling noise. Seals were often seen near active drillships and approached, to within 164 ft (50 m), a sound projector broadcasting low-frequency drilling sound.

Southall *et al.* (2007) reviewed literature describing responses of pinnipeds to non-pulsed sound and reported that the limited data suggest exposures between approximately 90 and 140 dB generally do not appear to induce strong behavioral responses in pinnipeds exposed to non-pulse sounds in water; no data exist regarding exposures at higher levels. It is important to note that among these studies, there are some apparent differences in responses between field and laboratory conditions. In contrast to the mid-frequency odontocetes, captive pinnipeds responded more strongly at lower levels than did animals in the field. Again, contextual issues are the likely cause of this difference.

Jacobs and Terhune (2002) observed harbor seal reactions to AHDs (source level in this study was 172 dB) deployed around aquaculture sites. Seals were generally unresponsive to sounds from the AHDs. During two specific events, individuals came within 141 and 144 ft (43 and 44 m) of active AHDs and failed to demonstrate any measurable behavioral response; estimated received levels based on the measures given were approximately 120 to 130 dB.

Costa *et al.* (2003) measured received noise levels from an Acoustic Thermometry of Ocean Climate (ATOC) program sound source off northern California using acoustic data loggers placed on translocated elephant seals. Subjects were captured on land, transported to sea, instrumented with archival acoustic tags, and released such that their transit would lead them near an active ATOC source (at 0.6 mi depth [939 m]; 75-Hz signal with 37.5-Hz bandwidth; 195 dB maximum source level, ramped up from 165 dB over 20 min) on their return to a haul-out site. Received exposure levels of the ATOC source for experimental subjects averaged 128 dB (range 118 to 137) in the 60- to 90-Hz band. None of the instrumented animals terminated dives or radically altered behavior upon exposure, but some statistically significant changes in diving parameters

were documented in nine individuals. Translocated northern elephant seals exposed to this particular non-pulse source began to demonstrate subtle behavioral changes at exposure to received levels of approximately 120 to 140 dB.

Kastelein *et al.* (2006) exposed nine captive harbor seals in an approximately 82 × 98 ft (25 × 30 m) enclosure to non-pulse sounds used in underwater data communication systems (similar to acoustic modems). Test signals were frequency modulated tones, sweeps, and bands of noise with fundamental frequencies between 8 and 16 kHz; 128 to 130 [± 3] dB source levels; 1- to 2-s duration [60–80 percent duty cycle]; or 100 percent duty cycle. They recorded seal positions and the mean number of individual surfacing behaviors during control periods (no exposure), before exposure, and in 15-min experimental sessions (n = 7 exposures for each sound type). Seals generally swam away from each source at received levels of approximately 107 dB, avoiding it by approximately 16 ft (5 m), although they did not haul out of the water or change surfacing behavior. Seal reactions did not appear to wane over repeated exposure (i.e., there was no obvious habituation), and the colony of seals generally returned to baseline conditions following exposure. The seals were not reinforced with food for remaining in the sound field.

Reactions of harbor seals to the simulated noise of a 2-megawatt wind power generator were measured by Koschinski *et al.* (2003). Harbor seals surfaced significantly further away from the sound source when it was active and did not approach the sound source as closely. The device used in that study produced sounds in the frequency range of 30 to 800 Hz, with peak source levels of 128 dB re 1 µPa at 1 m at the 80- and 160-Hz frequencies.

Ship and boat noise do not seem to have strong effects on seals in the water, but the data are limited. When in the water, seals appear to be much less apprehensive about approaching vessels. Some will approach a vessel out of apparent curiosity, including noisy vessels such as those operating seismic airgun arrays (Moulton and Lawson, 2002). Gray seals have been known to approach and follow fishing vessels in an effort to steal catch or the bait from traps. In contrast, seals hauled out on land often are quite responsive to nearby vessels. Terhune (1985) reported that northwest Atlantic harbor seals were extremely vigilant when hauled out and were wary of approaching (but less so passing) boats. Suryan and Harvey (1999) reported that Pacific

harbor seals commonly left the shore when powerboat operators approached to observe the seals. Those seals detected a powerboat at a mean distance of 866 ft (264 m), and seals left the haul-out site when boats approached to within 472 ft (144 m).

Hearing Impairment and Other Physiological Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds. Non-auditory physiological effects might also occur in marine mammals exposed to strong underwater sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, and other types of organ or tissue damage. It is possible that some marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds, particularly at higher frequencies. Non-auditory physiological effects are not anticipated to occur as a result of Port operations or maintenance, as none of the activities associated with the Neptune Port will generate sounds loud enough to cause such effects. The following subsections discuss in somewhat more detail the possibilities of TTS and permanent threshold shift (PTS).

TTS—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same sound exposure level [SEL]) producing equal amounts of hearing impairment regardless of how the sound energy is distributed in time (NIOSH, 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.*, 2007). Three newer studies, two by Mooney *et al.* (2009a, b) on a single bottlenose dolphin either exposed to playbacks of

U.S. Navy mid-frequency active sonar or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2007) on a single California sea lion exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations, the equal energy relationship may not be the best indicator to predict TTS onset levels. Generally, with sound exposures of equal energy, those that were quieter (lower sound pressure level [SPL]) with longer duration were found to induce TTS onset more than those of louder (higher SPL) and shorter duration. Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 µPa²·s (i.e., 186 dB SEL) in order to produce brief, mild TTS. NMFS considers TTS to be a form of Level B harassment, which temporarily causes a shift in an animal's hearing, and the animal is able to recover. Data on TTS from continuous sound (such as that produced by Neptune's proposed Port activities) are limited, so the available data from seismic activities are used as a proxy. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. Given that the SPL is approximately 10–15 dB higher than the SEL value for the same pulse, an odontocete would need to be exposed to a sound level of 190 dB re 1 µPa (rms) in order to incur TTS.

TTS was measured in a single, captive bottlenose dolphin after exposure to a continuous tone with maximum SPLs at frequencies ranging from 4 to 11 kHz that were gradually increased in intensity to 179 dB re 1 µPa and in duration to 55 minutes (Nachtigall *et al.*, 2003). No threshold shifts were measured at SPLs of 165 or 171 dB re 1 µPa. However, at 179 dB re 1 µPa, TTSs greater than 10 dB were measured during different trials with exposures ranging from 47 to 54 minutes. Hearing sensitivity apparently recovered within 45 minutes after noise exposure.

For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. Marine mammals can hear sounds at varying frequency levels. However, sounds that are produced in the frequency range at which an animal hears the best do not need to be as loud as sounds in less functional frequencies

to be detected by the animal. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). Therefore, for a sound to be audible, baleen whales require sounds to be louder (*i.e.*, higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. Based on this information, it is suspected that received levels causing TTS onset may also be higher in baleen whales. Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, NMFS' onset of TTS threshold is likely conservative for mysticetes.

In free-ranging pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. However, systematic TTS studies on captive pinnipeds have been conducted (Bowles *et al.*, 1999; Kastak *et al.*, 1999, 2005, 2007; Schusterman *et al.*, 2000; Finneran *et al.*, 2003; Southall *et al.*, 2007). Kastak *et al.* (1999) reported TTS of approximately 4–5 dB in three species of pinnipeds (harbor seal, Californian sea lion, and northern elephant seal) after underwater exposure for approximately 20 minutes to noise with frequencies ranging from 100–2,000 Hz at received levels 60–75 dB above hearing threshold. This approach allowed similar effective exposure conditions to each of the subjects, but resulted in variable absolute exposure values depending on subject and test frequency. Recovery to near baseline levels was reported within 24 hours of noise exposure (Kastak *et al.*, 1999). Kastak *et al.* (2005) followed up on their previous work using higher sensitivity levels and longer exposure times (up to 50-min) and corroborated their previous findings. The sound exposures necessary to cause slight threshold shifts were also determined for two California sea lions and a juvenile elephant seal exposed to underwater sound for similar duration. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.*, 2000; Kastak *et al.*, 2005, 2007). For very short exposures (*e.g.*, to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.*, 2003). For pinnipeds exposed to in-air sounds, auditory fatigue has been measured in response to single pulses

and to non-pulse noise (Southall *et al.*, 2007), although high exposure levels were required to induce TTS-onset (SEL: 129 dB re: 20 $\mu\text{Pa}^2\cdot\text{s}$; Bowles *et al.*, unpub. data).

NMFS (1995, 2000) concluded that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 μPa (rms). The established 180- and 190-dB re 1 μPa (rms) criteria are not considered to be the levels above which TTS might occur. Rather, they are the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. Since the modeled broadband source level for 100 percent thruster use during Port operations is 180 dB re 1 μPa at 1 m (rms), it is highly unlikely that marine mammals would be exposed to sound levels at the 180- or 190-dB thresholds, thereby reducing the risk of TTS to marine mammals in the area.

PTS—When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no specific evidence that exposure to underwater industrial sounds can cause PTS in any marine mammal (*see* Southall *et al.*, 2007). However, given the possibility that marine mammals might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to industrial activities might incur PTS. Richardson *et al.* (1995) hypothesized that PTS caused by prolonged exposure to continuous anthropogenic sound is unlikely to occur in marine mammals, at least for sounds with source levels up to approximately 200 dB re 1 μPa at 1 m (rms). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS.

It is highly unlikely that marine mammals could receive sounds strong enough (and over a sufficient duration) to cause PTS (or even TTS) during the proposed Port operations and

maintenance/repair activities. The modeled broadband source level for 100 percent thruster use during port operations is 180 dB re 1 μPa at 1 m (rms). This does not reach the threshold of 190 dB currently used for pinnipeds. The threshold for cetaceans is 180 dB; therefore, cetaceans would have to be immediately adjacent to the vessel even possibly incur hearing impairment. Based on this conclusion and the mitigation measures proposed for inclusion in the regulations (described later in this document in the “Proposed Mitigation” section), it is highly unlikely that any type of hearing impairment would occur as a result of Neptune's proposed activities.

Additionally, the potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the “Proposed Mitigation” and “Proposed Monitoring and Reporting” sections).

Anticipated Effects on Habitat

The primary potential impacts to marine mammals and other marine species are associated with elevated sound levels produced by the Port operations and maintenance/repair activities. However, other potential impacts from physical disturbance are also possible.

Potential Impacts From Repairs

Major repairs to the Neptune Port and pipeline may affect marine mammal habitat in several ways: Disturbing the seafloor; increasing turbidity slightly; and generating additional underwater sound in the area. Sediment transport modeling conducted by Neptune on construction procedures indicated that initial turbidity from installation of the pipeline could reach 100 milligrams per liter (mg/L), but will subside to 20 mg/L after 4 hours. Turbidity associated with the flowline and hot-tap will be considerably less and also will settle within hours of the work being completed. Therefore, any increase in turbidity from a major repair during operations is anticipated to be insignificant. Repair activities will not create long-term habitat changes, and marine mammals displaced by the disturbance to the seafloor are expected to return soon after the repair is completed.

During repair of the Neptune Port and pipeline, underwater sound levels will be temporarily elevated. These underwater sound levels will cause some marine species to temporarily disperse from or avoid repair areas, but

they are expected to return shortly after the repair is completed.

Based on the foregoing, repair activities will not create long-term habitat changes, and marine mammals displaced by the disturbance to the seafloor are expected to return soon after repair activities cease. Marine mammals also could be indirectly affected if benthic prey species are displaced or destroyed by repair activities. However, affected benthic species are expected to recover soon after the completion of repairs and will represent only a small portion of food available to marine mammals in the area.

Potential Impacts From Operation

Operation of the Port will result in long-term, continued disturbance of the seafloor, regular withdrawal of seawater, and generation of underwater sound.

Seafloor Disturbance: The structures associated with the Port (flowline and pipeline, unloading buoys and chains, suction anchors) will be permanent modifications to the seafloor. Up to 63.7 acres (0.25 km²) of additional seafloor will be subject to disturbance due to chain and flexible riser sweep while the buoys are occupied by SRVs.

Ballast and Cooling Water

Withdrawal: Withdrawal of ballast and cooling water at the Port as the SRV unloads cargo (approximately 2.39 million gallons [9 million liters] per day) could potentially entrain zooplankton and ichthyoplankton that serve as prey for some whale species. This estimate includes the combined seawater intake while two SRVs are moored at the Port (approximately 9 hr every 6 days). The estimated zooplankton abundance in the vicinity of the seawater intake ranges from 25.6–105 individuals per gallon (Libby *et al.*, 2004). This means that the daily intake will remove approximately 61.2–251 million individual zooplankton per day, the equivalent of approximately 7.65–31.4 lbs (3.47–14.2 kg). Since zooplankton are short-lived species (*e.g.*, most copepods live from 1 wk to several months), these amounts will be indistinguishable from natural variability.

In the long-term, approximately 64.6 acres (0.26 km²) of seafloor will be permanently disturbed to accommodate the Port (including the associated pipeline). The area disturbed because of long-term chain and riser sweep includes 63.7 acres (0.25 km²) of soft sediment. The area of disturbance will be similar in calm seas and in hurricane conditions. The chain weight will restrict the movement of the buoy or the vessel moored on the buoy. An

additional 0.9 acre (0.004 km²) of soft sediments will be converted to hard substrate. The total affected area will be small compared to the soft sediments available in the proposed project area. Long-term disturbance from installation of the Port will comprise approximately 0.3 percent of the estimated 24,000 acres (97 km²) of similar bottom habitat surrounding the project area (northeast sector of Massachusetts Bay).

It is likely that displaced organisms will not return to the area of continual chain and riser sweep. A shift in benthic faunal community is expected in areas where soft sediment is converted to hard substrate (Algonquin Gas Transmission LLC, 2005). This impact will be beneficial for species that prefer hard-bottom structure and adverse for species that prefer soft sediment. Overall, because of the relatively small areas that will be affected compared to the overall size of Massachusetts Bay, impacts on soft-bottom communities are expected to be minimal.

Daily removal of seawater will reduce the food resources available for planktivorous organisms. The marine mammal species in the area have fairly broad diets and are not dependent on any single species for survival. Because of the relatively low biomass that will be entrained by the Port, the broad diet of the marine mammals in the area, and broad availability of organisms in the proposed project area, indirect impacts on the food web that result from entrainment of planktonic fish and shellfish eggs and larvae are expected to be minor and therefore should have minimal impact on affected marine mammal species or stocks.

Potential Impacts From Sound Generation

The groups of important fish, including those that constitute prey for some of the marine mammals found in the project area, that occur in the vicinity of the Neptune Port are comprised of species showing considerable diversity in hearing sensitivity, anatomical features related to sound detection (*e.g.*, swim bladder, connections between swim bladder and ear), habitat preference, and life history. Neptune's application contains a discussion on sound production, sound detection, and variability of fish hearing sensitivities. Please refer to the application (*see ADDRESSES*) for the full discussion. A few summary paragraphs are provided here for reference.

Fishes produce sounds that are associated with behaviors that include territoriality, mate search, courtship, and aggression. It has also been speculated that sound production may

provide the means for long distance communication and communication under poor underwater visibility conditions (Zelick *et al.*, 1999), although the fact that fish communicate at low-frequency sound levels where the masking effects of ambient noise are naturally highest suggests that very long distance communication would rarely be possible. Fishes have evolved a diversity of sound generating organs and acoustic signals of various temporal and spectral contents. Fish sounds vary in structure, depending on the mechanism used to produce them (Hawkins, 1993). Generally, fish sounds are predominantly composed of low frequencies (less than 3 kHz).

Since objects in the water scatter sound, fish are able to detect these objects through monitoring the ambient noise. Therefore, fish are probably able to detect prey, predators, conspecifics, and physical features by listening to the environmental sounds (Hawkins, 1981). There are two sensory systems that enable fish to monitor the vibration-based information of their surroundings. The two sensory systems, the inner ear and the lateral line, constitute the acoustico-lateralis system.

Although the hearing sensitivities of very few fish species have been studied to date, it is becoming obvious that the intra- and inter-specific variability is considerable (Coombs, 1981). Nedwell *et al.* (2004) compiled and published available fish audiogram information. A noninvasive electrophysiological recording method known as auditory brainstem response (ABR) is now commonly used in the production of fish audiograms (Yan, 2004). Generally, most fish have their best hearing in the low-frequency range (*i.e.*, less than 1 kHz). Even though some fish are able to detect sounds in the ultrasonic frequency range, the thresholds at these higher frequencies tend to be considerably higher than those at the lower end of the auditory frequency range. This generalization applies to fish species occurring in the Neptune Port area. Table 9–1 in Neptune's application (*see ADDRESSES*) outlines the measured auditory sensitivities of fish that are most relevant to the Neptune Port area.

Literature relating to the impacts of sound on marine fish species can be divided into the following categories: (1) Pathological effects; (2) physiological effects; and (3) behavioral effects. Pathological effects include lethal and sub-lethal physical damage to fish; physiological effects include primary and secondary stress responses; and behavioral effects include changes in exhibited behaviors of fish. Behavioral changes might be a direct reaction to a

detected sound or a result of the anthropogenic sound masking natural sounds that the fish normally detect and to which they respond. The three types of effects are often interrelated in complex ways. For example, some physiological and behavioral effects could potentially lead to the ultimate pathological effect of mortality. Hastings and Popper (2005) reviewed what is known about the effects of sound on fishes and identified studies needed to address areas of uncertainty relative to measurement of sound and the responses of fishes. Popper *et al.* (2003/2004) also published a paper that reviews the effects of anthropogenic sound on the behavior and physiology of fishes.

The following discussions of the three primary types of potential effects on fish from exposure to sound consider continuous sound sources since, such sounds will be generated by the proposed activities associated with the Neptune Port; however, most research reported in the literature focuses on the effects of airguns, which produce pulsed sounds. A full discussion is provided in Neptune's application (*see ADDRESSES*), and a summary is provided here.

Potential effects of exposure to continuous sound on marine fish include TTS, physical damage to the ear region, physiological stress responses, and behavioral responses such as startle response, alarm response, avoidance, and perhaps lack of response due to masking of acoustic cues. Most of these effects appear to be either temporary or intermittent and therefore probably do not significantly impact the fish at a population level. The studies that resulted in physical damage to the fish ears used noise exposure levels and durations that were far more extreme than would be encountered under conditions similar to those expected at the Neptune Port.

The known effects of underwater noise on fish have been reviewed. Noise levels needed to cause temporary hearing loss and damage to hearing are higher and last longer than noise that will be produced at Neptune. The situation for disturbance responses is less clear. Fish do react to underwater noise from vessels and move out of the way, move to deeper depths, or change their schooling behavior. The received levels at which fish react are not known and in fact are somewhat variable depending upon circumstances and species. In order to assess the possible effects of underwater project noise, it is best to examine project noise in relation to continuous noises routinely produced by other projects and activities such as shipping, fishing, etc.

The two long-term sources of continuous noise associated with the project are the ship transits between the Boston shipping lanes and the unloading buoys and the regasification process at the carriers when moored to the unloading buoys. Noise levels associated with these two activities are relatively low and are unlikely to have any effect on prey species in the area. One other activity expected to produce short periods of continuous noise is the carrier maneuvering bouts at the Port. Although this activity is louder, it is still less than the noise levels associated with large ships at cruising speed. The carrier maneuvering using the ship's thrusters would produce short periods of louder noise for 10–30 minutes every 4–8 days. On average, these thruster noises would be heard about 20 hr/yr. Even in the unlikely event that these two activities caused disturbance to marine fish, the short periods of time involved serve to minimize the effects.

In conclusion, NMFS has preliminarily determined that Neptune's proposed port operations and maintenance/repair activities are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

Neptune proposed several mitigation measures in the application (*see ADDRESSES*). After a review of these measures, NMFS determined that some additional measures should also be proposed in order to effect the least practicable adverse impact on the species or stock and its habitat. Both sets of measures are discussed next. These measures are the same ones that were proposed in the 2010 IHA **Federal Register** notice (75 FR 24906, May 6, 2010) and that are currently required to be implemented by Neptune in the 2010 IHA (75 FR 41440, July 16, 2010).

Mitigation Measures Proposed in Neptune's Application

Neptune submitted a "Marine Mammal Detection, Monitoring, and Response Plan for the Operations Phase" (the Plan) as part of its MMPA application (Appendix D of the application; *see ADDRESSES*). The measures, which include safety zones and vessel speed reductions, are fully described in the Plan and summarized here. The 500 yd (457 m) safety zone for North Atlantic right whales is based on the approach regulation found at 50 CFR 224.103. The 100 yd (91 m) safety zone for other marine mammal species was taken from measures included in the 2007 Biological Opinion completed by NMFS' Northeast Regional Office. Any maintenance and/or repairs needed will be scheduled in advance during the May 1 to November 30 seasonal window, whenever possible, so that disturbance to North Atlantic right whales will be largely avoided. If the repair cannot be scheduled during this time frame, additional mitigation measures are proposed for inclusion in these regulations and described in part (2) of this subsection.

(1) Mitigation Measures for Major Repairs (May 1 to November 30)

(A) During repairs, if a marine mammal is detected within 0.5 mi (0.8 km) of the repair vessel, the vessel superintendent or on-deck supervisor will be notified immediately. The vessel's crew will be put on a heightened state of alert. The marine mammal will be monitored constantly to determine if it is moving toward the repair area.

(B) Repair vessels will cease any movement in the area if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) from the operating repair vessel. Repair vessels will cease any movement in the area if a right whale is sighted within or approaching to a distance of 500 yd (457 m) from the operating vessel. Vessels transiting the repair area, such as pipe haul barge tugs, will also be required to maintain these separation distances.

(C) Repair vessels will cease all sound emitting activities if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) or if a right whale is sighted within or approaching to a distance of 500 yd (457 m), from the operating repair vessel. The back-calculated source level, based on the most conservative cylindrical model of acoustic energy spreading, is estimated to be 139 dB re 1 μ Pa.

(D) Repair activities may resume after the marine mammal is positively reconfirmed outside the established zones (either 500 yd (457 m) or 100 yd (91 m), depending upon species).

(E) While under way, all repair vessels will remain 500 yd (457 m) away from right whales and 100 yd (91 m) away from all other marine mammals, unless constrained by human safety concerns or navigational constraints.

(F) All repair vessels 300 gross tons or greater will maintain a speed of 10 knots (18.5 km/hr) or less. Vessels less than 300 gross tons carrying supplies or crew between the shore and the repair site will contact the Mandatory Ship Reporting System, the USCG, or the protected species observers (PSOs) at the repair site before leaving shore for reports of recent right whale sightings or active Dynamic Management Areas (DMAs) and, consistent with navigation safety, restrict speeds to 10 knots (18.5 km/hr) or less within 5 mi (8 km) of any recent sighting location and within any existing DMA.

(G) Vessels transiting through the Cape Cod Canal and CCB between January 1 and May 15 will reduce speeds to 10 knots (18.5 km/hr) or less, follow the recommended routes charted by NOAA to reduce interactions between right whales and shipping traffic, and avoid aggregations of right whales in the eastern portion of CCB.

(2) Additional Port and Pipeline Major Repair Measures (December 1 to April 30)

If unplanned/emergency repair activities cannot be conducted between May 1 and November 30, Neptune has proposed to implement the following additional mitigation measures:

(A) If on-board PSOs do not have at least 0.5-mi (0.8-km) visibility, they shall call for a shutdown of repair activities. If dive operations are in progress, then they shall be halted and divers brought on board until visibility is adequate to see a 0.5-mi (0.8-km) range. At the time of shutdown, the use of thrusters must be minimized to the lowest level needed to maintain personnel safety. If there are potential safety problems due to the shutdown, the captain will decide what operations can safely be shut down and will document such activities in the data log.

(B) Prior to leaving the dock to begin transit, the barge will contact one of the PSOs on watch to receive an update of sightings within the visual observation area (within 0.6 mi (1 km) of the Port). If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel will hold for 30 minutes and again seek clearance to

leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release and will grant clearance if no North Atlantic right whales have been sighted in the last 30 minutes in the visual observation area.

(C) Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels who will have responsibilities for watching for marine mammals. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in the LOA, sighting log requirements, and procedures for reporting injured or dead marine mammals. These designated crew members will be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew members will sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch will be recorded in the log book. Any whale sightings within 3,281 ft (1,000 m) of the vessel will result in a high alert and slow speed of 4 knots (7.4 km/hr) or less. A sighting within 2,461 ft (750 m) will result in idle speed and/or ceasing all movement.

(D) The material barges and tugs used for repair work shall transit from the operations dock to the work sites during daylight hours, when possible, provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug will be 5 knots (9.3 km/hr).

(E) Consistent with navigation safety, all repair vessels must maintain a speed of 10 knots (18.5 km/hr) or less during daylight hours. All vessels will operate at 5 knots (9.3 km/hr) or less at all times within 3.1 mi (5 km) of the repair area.

(3) Speed Restrictions in Seasonal Management Areas (SMAs)

Repair vessels and SRVs will transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' final rule (73 FR 60173, October 10, 2008) to implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

- CCB SMA from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42°12' N. latitude;

- Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30' N. 69°45' W.; thence to 42°30' N. 70°30' W.; thence to 42°12' N. 70°30' W.; thence to 42°12' N. 70°12' W.; thence to 42°04'56.5" N. 70°12' W.; thence along mean high water line and inshore limits of COLREGS limit to a latitude of 41°40' N.; thence due east to 41°41' N. 69°45' W.; thence back to starting point; and

- GSC SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

42°30' N. 69°45' W.
41°40' N. 69°45' W.
41°00' N. 69°05' W.
42°09' N. 67°08'24" W.
42°30' N. 67°27' W.
42°30' N. 69°45' W.

(4) Additional Mitigation Measures

(A) In approaching and departing from the Neptune Port, SRVs shall use the Boston TSS starting and ending at the entrance to the GSC. Upon entering the TSS, the SRV shall go into a "heightened awareness" mode of operation, which is outlined in great detail in the Plan (see Neptune's application).

(B) In the event that a whale is visually observed within 0.6 mi (1 km) of the Port or a confirmed acoustic detection is reported on either of the two auto-detection buoys (ABs; more information on the acoustic devices is contained in the "Proposed Monitoring and Reporting" section later in this document) closest to the Port, departing SRVs shall delay their departure from the Port, unless extraordinary circumstances, defined in the Plan, require that the departure is not delayed. The departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 0.6 mi (1 km) from the Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the Port or visually within 0.6 mi (1 km) from Neptune.

(C) SRVs that are approaching or departing from the Port and are within the Area to be Avoided (ATBA) surrounding Neptune shall remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) away from all other visually detected whales unless extraordinary circumstances, as defined in Section 1.2 of the Plan in Neptune's application, require that the vessel stay its course. The ATBA is defined in 33 CFR 150.940. It is the largest area of the

Port marked on nautical charts, and it is enforceable by the USCG in accordance with the 150.900 regulations. The Vessel Master shall designate at least one lookout to be exclusively and continuously monitoring for the presence of marine mammals at all times while the SRV is approaching or departing Neptune.

(D) Neptune will ensure that other vessels providing support to Neptune operations during regasification activities that are approaching or departing from the Port and are within the ATBA shall be operated so as to remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) from all other visually detected whales.

Additional Mitigation Measures Proposed by NMFS

In addition to the mitigation measures proposed in Neptune's application, NMFS proposes the following measures be included in these proposed regulations in order to ensure the least practicable adverse impact on the affected species or stocks:

(1) Neptune must immediately suspend any repair and maintenance or operations activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the LNG facility activities. Upon finding a dead or injured marine mammal, Neptune must contact NMFS, the Northeast Stranding and Disentanglement Program, and the USCG. NMFS will review the documentation submitted by the PSO and attempt to attribute a cause of death. Activities will not resume until review and approval has been given by NMFS.

(2) PSOs will direct a moving vessel to slow to idle if a baleen whale is seen less than 0.6 mi (1 km) from the vessel.

(3) Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

Proposed Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential

measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the mitigation measures proposed above from both NMFS and Neptune (hereinafter the "proposed mitigation measures") provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

The proposed rule comment period will afford the public an opportunity to submit recommendations, views, and/or concerns regarding this action and the proposed mitigation measures. While NMFS has determined preliminarily that the proposed mitigation measures presented in this document will effect the least practicable adverse impact on the affected species or stocks and their habitat, NMFS will consider all public comments to help inform our final decision. Consequently, the proposed mitigation measures may be refined, modified, removed, or added to prior to the issuance of the final rule based on public comments received, and where appropriate, further analysis of any additional mitigation measures.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must, where applicable, set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Neptune proposed both visual and acoustic monitoring programs in the Plan contained in the application. The Plan may be modified or supplemented based on comments or new information

received from the public during the public comment period. Summaries of those plans, as well as the proposed reporting, are contained next.

Passive Acoustic Monitoring

Neptune LNG will deploy and maintain a passive acoustic detection network along a portion of the TSS and in the vicinity of Neptune. This network will consist of autonomous recording units (ARUs) and near-real-time ABs. To develop, implement, collect, and analyze the acoustic data obtained from deployment of the ARUs and ABs, as well as to prepare reports and maintain the passive acoustic detection network, Neptune LNG has engaged the Cornell University Bioacoustic Research Program (BRP) in Ithaca, New York, and the Woods Hole Oceanographic Institution (WHOI) in Woods Hole, Massachusetts.

During June 2008, an array of 19 passive seafloor ARUs was deployed by BRP for Neptune. The layout of the array centered on the terminal site and was used to monitor the noise environment in Massachusetts Bay in the vicinity of Neptune during construction of the Port and associated pipeline lateral. The ARUs were not designed to provide real-time or near-real-time information about vocalizing whales. Rather, archival noise data collected from the ARU array were used for the purpose of understanding the seasonal occurrences and overall distributions of whales (primarily North Atlantic right whales) within approximately 11.5 mi (18.5 km) of the Neptune Port. Neptune LNG will maintain these ARUs in the same configuration for a period of five years during full operation of the Neptune Port in order to monitor the actual acoustic output of port operations and to alert NOAA to any unanticipated effects of port operations, such as large scale abandonment by marine mammals of the area. To further assist in evaluations of Neptune's acoustic output, source levels associated with DP of SRVs at the buoys will be estimated using empirical measurements collected from the passive detection network.

In addition to the ARUs, Neptune LNG has deployed 10 ABs within the Separation Zone of the TSS for the operational life of the Port. The purpose of the AB array is to detect the presence of vocalizing North Atlantic right whales. Each AB has an average detection range of 5.8 mi (9.3 km) from the AB, although detection ranges will vary based on ambient underwater conditions. The AB system will be the primary detection mechanism that alerts the SRV Master to the occurrence of

right whales in the TSS and triggers heightened SRV awareness. The configurations of the ARU array and AB network (see Figure 3 in the Plan in Neptune's application) were based upon the configurations developed and recommended by NOAA personnel.

Each AB deployed in the TSS will continuously screen the low-frequency acoustic environment (less than 1,000 Hz) for right whale contact calls occurring within an approximately 5.8-mi (9.3-km) radius from each buoy (the ABs' detection range) and rank detections on a scale from 1 to 10. Each AB shall transmit all detection data in near-real-time for detections of rank greater than or equal to 6 via Iridium satellite link to the BRP server website every 20 minutes. This 20-minute transmission schedule was determined by consideration of a combination of factors including the tendency of right whale calls to occur in clusters (leading to a sampling logic of listening for other calls rather than transmitting immediately upon detection of a possible call) and the amount of battery power required to complete a satellite transmission. Additional details on the protocol can be found in Neptune's application.

Some additional passive acoustic monitoring is proposed for repair activities that occur between May 1 and November 30 in any given year in order to better detect right whales in the area of repair work and to collect additional data on the noise levels produced during repair and maintenance activities. Neptune shall work with NOAA (NMFS and SBNMS) to install a passive acoustic system to detect and provide early warnings for potential occurrence of right whales in the vicinity of the repair area. The number of passive acoustic detection buoys installed around the activity site will be commensurate with the type and spatial extent of maintenance/repair work required, but must be sufficient to detect vocalizing right whales within the 120-dB impact zone. Neptune shall provide NMFS with empirically measured source level data for all sources of noise associated with LNG port maintenance and repair activities. Measurements should be carefully coordinated with noise-producing activities and should be collected from platforms that are as close as possible to noise producing activities.

Lastly, to further assist in evaluations of the Neptune Port's operational acoustic output, source levels associated with dynamic positioning of SRVs at the buoys will be estimated using empirical measurements collected from a platform

positioned as close as practicable to thrusters while in use.

Visual Monitoring

(1) Maintenance and Repair Activities

During maintenance- and repair-related activities, Neptune LNG shall employ two qualified PSOs on each vessel that has a DP system. All PSOs must receive training and be approved in advance by NOAA after a review of their qualifications. Qualifications for these PSOs shall include direct field experience on a marine mammal observation vessel and/or aerial surveys in the Atlantic Ocean/Gulf of Mexico. The PSOs (one primary and one secondary) are responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary PSO shall act as the identification specialist, and the secondary PSO will serve as data recorder and will assist with identification. Both PSOs shall have responsibility for monitoring for the presence of marine mammals.

The PSOs shall monitor the area where maintenance and repair work is conducted beginning at daybreak using the naked eye, hand-held binoculars, and/or power binoculars (e.g. Big Eyes). The PSOs shall scan the ocean surface by eye for a minimum of 40 minutes every hour. All sightings must be recorded on marine mammal field sighting logs.

(2) Operations

While an SRV is navigating within the designated TSS, three people have lookout duties on or near the bridge of the ship including the SRV Master, the Officer-of-the-Watch, and the Helmsman on watch. In addition to standard watch procedures, while the SRV is within the ATBA and/or while actively engaging in the use of thrusters, an additional lookout shall be designated to exclusively and continuously monitor for marine mammals. Once the SRV is moored and regasification activities have begun, the vessel is no longer considered to be in "heightened awareness" status. However, when regasification activities conclude and the SRV prepares to depart from Neptune, the Master shall once again ensure that the responsibilities as defined in the Plan are carried out. All sightings of marine mammals by the designated lookout, individuals posted to navigational lookout duties, and/or any other crew member while the SRV is within the TSS, in transit to the ATBA, within the ATBA, and/or when actively engaging in the use of thrusters shall be immediately reported to the

Officer-of-the-Watch who shall then alert the Master.

Reporting Measures

Since the Neptune Port is within the Mandatory Ship Reporting Area (MSRA), all SRVs transiting to and from Neptune shall report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA shall report their activities to WHALESNORTH. Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system.

For any repair work associated with the pipeline lateral or other port components, Neptune LNG shall notify the appropriate NOAA personnel as soon as practicable after it is determined that repair work must be conducted. During maintenance and repair of the pipeline lateral or other port components, weekly status reports must be provided to NOAA. The weekly report must include data collected for each distinct marine mammal species observed in the project area during the period of the repair activity. The weekly reports shall include the following:

- The location, time, and nature of the pipeline lateral repair activities;
- Whether the DP system was operated and, if so, the number of thrusters used and the time and duration of DP operation;
- Marine mammals observed in the area (number, species, age group, and initial behavior);
- The distance of observed marine mammals from the repair activities;
- Observed marine mammal behaviors during the sighting;
- Whether any mitigation measures were implemented;
- Weather conditions (sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, etc.);
- Condition of the marine mammal observation (visibility and glare); and
- Details of passive acoustic detections and any action taken in response to those detections.

For minor repairs and maintenance activities, the following protocols will be followed:

- All vessel crew members will be trained in marine mammal identification and avoidance procedures;
- Repair vessels will notify designated NOAA personnel when and where the repair/maintenance work is to take place along with a tentative schedule and description of the work;

- Vessel crews will record/document any marine mammal sighting(s) during the work period; and

- At the conclusion of the repair/maintenance work, a report will be delivered to designated NOAA personnel describing any marine mammal sightings, the type of work taking place when the sighting occurred, and any avoidance actions taken during the repair/maintenance work.

During all phases of project repair/maintenance activities and operation, sightings of any injured or dead marine mammals will be reported immediately to the USCG, NMFS, and the Northeast Stranding and Disentanglement Program, regardless of whether the injury or death is caused by project activities. Sightings of injured or dead marine mammals not associated with project activities can be reported to the USCG on VHF Channel 16 or to NMFS Stranding and Entanglement Hotline. In addition, if the injury or death was caused by a project vessel (e.g., SRV, support vessel, or repair/maintenance vessel), USCG must be notified immediately, and a full report must be provided to NMFS, Northeast Regional Office, and NMFS, Office of Protected Resources. The report must include the following information: (1) The time, date, and location (latitude/longitude) of the incident; (2) the name and type of vessel involved; (3) the vessel's speed during the incident; (4) a description of the incident; (5) water depth; (6) environmental conditions (e.g., wind speed and direction, sea state, cloud cover, and visibility); (7) the species identification or description of the animal; (8) the fate of the animal; and (9) photographs or video footage of the animal (if equipment is available). Activities will not resume until review and approval has been given by NMFS.

An annual report on marine mammal monitoring and mitigation will be submitted to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office, on August 1 of each year. The annual report shall cover the time period of July 1 through June 30 of each year of activity. The weekly and annual reports should include data collected for each distinct marine mammal species observed in the project area in Massachusetts Bay during the period of LNG facility operations and repair/maintenance activities. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation and repair/maintenance activities shall also be included in the annual reports. Additional information

that will be recorded during operation and repair/maintenance activities and contained in the reports include: date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel or at the construction site when a marine mammal is sighted, and whether thrusters were in use and, if so, how many at the time of the sighting.

In addition to annual reports, NMFS proposes to require Neptune to submit a draft comprehensive final report to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office, 180 days prior to the expiration of the regulations. This comprehensive technical report will provide full documentation of methods, results, and interpretation of all monitoring during the first 4½ years of the LOA. A revised final comprehensive technical report, including all monitoring results during the entire period of the LOAs will be due 90 days after the end of the period of effectiveness of the regulations.

General Conclusions Drawn From Previous Monitoring Reports

Throughout the construction period, Neptune submitted weekly reports on marine mammal sightings in the area. While it is difficult to draw biological conclusions from these reports, NMFS can make some general conclusions. Data gathered by PSOs is generally useful to indicate the presence or absence of marine mammals (often to a species level) within the safety zones (and sometimes without) and to document the implementation of mitigation measures. Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance as a result of Neptune's activities were observed by the PSOs. Of course, these observations only cover the animals that were at the surface and within the distance that the PSOs could see. Based on the number of sightings contained in the weekly reports, it appears that NMFS' estimated take levels are accurate. No SRVs have yet arrived at the Port for regasification; therefore, there are no reports describing the results of the visual monitoring program for this phase of the project. However, it is anticipated that visual observations will be able to continue as they were during construction.

As described previously in this document, Neptune was required to maintain an acoustic array to monitor calling North Atlantic right whales (humpback and fin whale calls were also able to be detected). Cornell BRP analyzed the data and submitted a

report covering the initial construction phase of the project, which occurred in 2008. While acoustic data can only be collected if the animals are actively calling, the report indicates that humpback and fin whales were heard calling on at least some of the ARUs on all construction days, and right whale calls were heard only 28 percent of the time during active construction days. The passive acoustic arrays will remain deployed during the time frame of these proposed regulations in order to obtain information during the operational phase of the Port facility.

Adaptive Management

The final regulations governing the take of marine mammals incidental to operation and repair/maintenance activities at the Neptune Port will contain an adaptive management component. In accordance with 50 CFR 216.105(c), regulations for the proposed activity must be based on the best available information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review. The use of adaptive management will allow NMFS to consider new information from different sources to determine if mitigation or monitoring measures should be modified (including additions or deletions) if new data suggest that such modifications are appropriate for subsequent LOAs.

The following are some of the possible sources of applicable data:

- Results from Neptune's monitoring from the previous year;
- Results from general marine mammal and sound research; or
- Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

If, during the effective dates of the regulations, new information is presented from monitoring, reporting, or research, these regulations may be modified, in whole, or in part after notice and opportunity of public review, as allowed for in 50 CFR 216.105(c). In addition, LOAs shall be withdrawn or suspended if, after notice and opportunity for public comment, the Assistant Administrator finds, among other things, the regulations are not being substantially complied with or the taking allowed is having more than a negligible impact on the species or stock, as allowed for in 50 CFR 216.106(e). That is, should substantial changes in marine mammal populations in the project area occur or monitoring

and reporting show that the Port operations are having more than a negligible impact on marine mammals, then NMFS reserves the right to modify the regulations and/or withdraw or suspend LOAs after public review.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: "Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]." Only take by Level B harassment is anticipated as a result of Neptune's operational and repair/maintenance activities. Anticipated take of marine mammals is associated with thruster sound during maneuvering of the SRVs while docking and undocking, occasional weathervaning at the Port, and during thruster use of DP maintenance vessels should a major repair be necessary. The regasification process itself is an activity that does not rise to the level of taking, as the modeled source level for this activity is 110 dB (rms). Certain species may have a behavioral reaction to the sound emitted during the activities; however, hearing impairment as a result of these activities is not anticipated. Additionally, vessel strikes are not anticipated, especially because of the speed restriction measures that are proposed that were described earlier in this document.

For continuous sounds, such as those produced by Neptune's proposed activities, NMFS uses a received level of 120-dB (rms) to indicate the onset of Level B harassment. The basis for Neptune's "take" estimate is the number of marine mammals that potentially could be exposed to sound levels in excess of 120 dB. This has been determined by applying the modeled zone of influence (ZOI; e.g., the area ensonified by the 120-dB contour) to the seasonal use (density) of the area by marine mammals and correcting for seasonal duration of sound-generating activities and estimated duration of individual activities when the maximum sound-generating activities are intermittent to occasional. Nearly all of the required information is readily available in the MARAD/USCG Final EIS, with the exception of marine mammal density estimates for the

project area. In the case of data gaps, a conservative approach was used to ensure that the potential number of takes is not underestimated, as described next.

In 2009, Neptune contracted JASCO to conduct sound source measurement tests on the SRV while using the thrusters at full power. The reports are contained in Appendix C of Neptune's application (*see ADDRESSES*). The results for the use of both bow thrusters at 100 percent power indicate that the 120-dB radius is estimated to be 1.9 mi (3 km), creating a maximum ZOI of 11.2 mi² (29 km²). Since thruster use will be intermittent during the docking and regasification activities, this zone presents a realistic representation of the amount of area that could potentially be ensonified for a short period of time to dock the SRV to the Port.

Other vessels would be required for use during maintenance and repair activities at the Port facility. Sounds generated during those activities would be similar to or less than those generated during original construction of the facility. Therefore, NMFS has used the 120-dB contour estimated for construction in the previous IHAs (*see* 74 FR 21648, May 8, 2009) for repair and maintenance activities. Depending on water depth, the 120-dB contour during repair and maintenance activities will extend from the source (the Port) out to 2.4 mi (3.9 km) and cover an area of 20.1 mi² (52 km²).

NMFS recognizes that baleen whale species other than North Atlantic right whales have been sighted in the project area from May to November. However, the occurrence and abundance of fin, humpback, and minke whales is not well documented within the project area. Nonetheless, NMFS used the data on cetacean distribution within Massachusetts Bay, such as those published by the NCCOS (2006), to determine potential takes of marine mammals in the vicinity of the project area. Neptune presented density estimates using the CETAP (1982) and U.S. Navy MRA (2005) data. The NCCOS (2006) report uses information from these sources; however, it also includes information from some other studies. Therefore, NMFS used density information for the species that are included in the NCCOS (2006) report. These species include: North Atlantic right, fin, humpback, minke, pilot, and sei whales and Atlantic white-sided dolphins.

The NCCOS study used cetacean sightings from two sources: (1) the North Atlantic Right Whale Consortium (NARWC) sightings database held at the University of Rhode Island (Kenney,

2001); and (2) the Manomet Bird Observatory (MBO) database, held at NMFS' Northeast Fisheries Science Center (NEFSC). The NARWC data contained survey efforts and sightings data from ship and aerial surveys and opportunistic sources between 1970 and 2005. The main data contributors included: the CETAP, the Canadian Department of Fisheries and Oceans, the Provincetown Center for Coastal Studies, International Fund for Animal Welfare, NEFSC, New England Aquarium, WHOI, and the University of Rhode Island. A total of 406,293 mi (653,725 km) of survey track and 34,589 cetacean observations were provisionally selected for the NCCOS study in order to minimize bias from uneven allocation of survey effort in both time and space. The sightings-per-unit-effort (SPUE) was calculated for all cetacean species by month covering the southern Gulf of Maine study area, which also includes the project area (NCCOS, 2006).

The MBO's Cetacean and Seabird Assessment Program (CSAP) was contracted from 1980 to 1988 by NEFSC to provide an assessment of the relative abundance and distribution of cetaceans, seabirds, and marine turtles in the shelf waters of the northeastern U.S. (MBO, 1987). The CSAP program was designed to be completely compatible with NEFSC databases so that marine mammal data could be compared directly with fisheries data throughout the time series during which both types of information were gathered. A total of 8,383 mi (5,210 km) of survey distance and 636 cetacean observations from the MBO data were included in the NCCOS analysis. Combined valid survey effort for the NCCOS studies included 913,840 mi (567,955 km) of survey track for small cetaceans (dolphins and porpoises) and 1,060,226 mi (658,935 km) for large cetaceans (whales) in the southern Gulf of Maine. The NCCOS study then combined these two data sets by extracting cetacean sighting records, updating database field names to match the NARWC database, creating geometry to represent survey tracklines and applying a set of data selection criteria designed to minimize uncertainty and bias in the data used.

Based on the comprehensiveness and total coverage of the NCCOS cetacean distribution and abundance study, NMFS calculated the estimated take number of marine mammals based on the most recent NCCOS report published in December, 2006. A summary of seasonal cetacean distribution and abundance in the project area is provided previously in this document, in the "Description of

Marine Mammals in the Area of the Specified Activity” section. For a detailed description and calculation of the cetacean abundance data and SPUE, refer to the NCCOS study (NCCOS, 2006). SPUE for all four seasons were analyzed, and the highest value SPUE for the season with the highest abundance of each species was used to determine relative abundance. Based on the data, the relative abundance of North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins, as calculated by SPUE in number of animals per square kilometer, is 0.0082, 0.0097, 0.0265, 0.0059, 0.0084, 0.0407, and 0.1314 n/km, respectively. Table 1 in this document outlines the density, abundance, take estimates, and percent of population for the 14 species for which NMFS is proposing to authorize Level B harassment.

In calculating the area density of these species from these linear density data, NMFS used 0.25 mi (0.4 km) as a conservative hypothetical strip width (W). Thus the area density (D) of these species in the project area can be obtained by the following formula:

$$D = SPUE / 2W.$$

Based on the calculation, the estimated take numbers by Level B harassment on an annual basis for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins, within the 120-dB ZOI of the LNG Port facility area of approximately 11.2 mi² (29 km²) maximum ZOI, corrected for 50 percent underwater, are 22, 26, 72, 16, 6, 111, and 357, respectively. This estimate is based on an estimated 50 SRV trips annually (for all of these species except for sei whales) that will produce sounds of 120 dB or greater. This estimate is based on an estimated 12.5 SRV trips

annually that will produce sounds of 120 dB or greater for sei whales. Sei whales only occur in the area in the spring. Therefore, shipments during the other three months will not result in the take of sei whales. For this reason, take from shipment operations has only been calculated at a quarter of the rate of the other species.

Based on the same calculation method described above for Port operations (but using the 120-dB ZOI of approximately 20.1 mi² (52 km²)), the estimated take numbers by Level B harassment on an annual basis for North Atlantic right, fin, humpback, minke, sei, and pilot whales and Atlantic white-sided dolphins incidental to Port maintenance and repair activities, corrected for 50 percent underwater, are 11, 13, 36, 8, 11, 56, and 179, respectively. These numbers are based on 14 days of repair and maintenance activities occurring annually. It is unlikely that this much repair and maintenance work would be required each year.

The total estimated annual take of these species as a result of both operations and repair and maintenance activities of the Neptune Port facility is: 33 North Atlantic right whales; 39 fin whales; 108 humpback whales; 24 minke whales; 17 sei whales; 166 long-finned pilot whales; and 536 Atlantic white-sided dolphins. These numbers represent a maximum of 9.9, 1.8, 12.8, 0.7, 4.4, 0.5, and 0.8 percent of the populations for these species or stocks in the western North Atlantic, respectively. It is likely that individual animals will be “taken” by harassment multiple times (because certain individuals may occur in the area more than once while other individuals of the population or stock may not enter the proposed project area). Additionally, the highest value SPUE for the season with the highest abundance of each species

was used to determine relative abundance. Moreover, it is not expected that Neptune will have 50 SRV transits and LNG deliveries in the first year or two of operations. Therefore, these percentages represent the upper boundary of the animal population that could be affected. Thus, the actual number of individual animals being exposed or taken is expected to be far less, especially in the first couple of years of operation.

In addition, bottlenose dolphins, common dolphins, Risso’s dolphins, killer whales, harbor porpoises, harbor seals, and gray seals could also be taken by Level B harassment as a result of the deepwater LNG port project. Because these species are less likely to occur in the area, and there are no density estimates specific to this particular area, NMFS based the take estimates on one or two encounters with typical group size. Therefore, NMFS estimates that up to approximately 10 bottlenose dolphins, 20 common dolphins, 20 Risso’s dolphins, 20 killer whales, 5 harbor porpoises, 15 harbor seals, and 15 gray seals could be exposed to continuous noise at or above 120 dB re 1 µPa rms incidental to operations and repair and maintenance activities annually, respectively.

Because Massachusetts Bay represents only a small fraction of the western North Atlantic basin where these animals occur NMFS has preliminarily determined that only small numbers of the marine mammal species or stocks in the area would be potentially affected by the Neptune LNG deepwater project. The take estimates presented in this section of the document do not take into consideration the mitigation and monitoring measures that are proposed for inclusion in the regulations (if issued).

TABLE 1—DENSITY ESTIMATES, POPULATION ABUNDANCE ESTIMATES, TOTAL ANNUAL PROPOSED TAKE (WHEN COMBINE TAKES FROM OPERATION AND MAINTENANCE/REPAIR ACTIVITIES), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES

Species	SPUE (n/km)	Abundance ¹	Abundance ²	Total annual proposed take	Percentage of stock or population
North Atlantic right whale	0.0082	345	361	33	9.1–9.6
Fin whale	0.0097	2,269	3,985	39	1–1.7
Humpback whale	0.0265	847	847	108	12.8
Minke whale	0.0059	3,312	8,987	24	0.3–0.7
Sei whale	0.0084	386	386	17	4.4
Long-finned pilot whale	0.0407	31,139	12,619	167	0.5–1.3
Atlantic white-sided dolphin	0.1314	63,368	63,368	536	0.8
Bottlenose dolphin	NA	7,489	9,604	10	0.1
Common dolphin	NA	120,743	120,743	20	0.02
Risso’s dolphin	NA	20,479	20,479	20	0.1
Killer whale	NA	NA	NA	20	NA
Harbor porpoise	NA	89,054	89,054	5	0.01
Harbor seal	NA	99,340	NA	15	0.02

TABLE 1—DENSITY ESTIMATES, POPULATION ABUNDANCE ESTIMATES, TOTAL ANNUAL PROPOSED TAKE (WHEN COMBINE TAKES FROM OPERATION AND MAINTENANCE/REPAIR ACTIVITIES), AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN FOR THE POTENTIALLY AFFECTED SPECIES—Continued

Species	SPUE (n/km)	Abundance ¹	Abundance ²	Total annual proposed take	Percentage of stock or population
Gray seal	NA	125,541–169,064	125,541–169,064	15	0.01

¹ Abundance estimates in 2009 NMFS Atlantic and Gulf of Mexico SAR; ² Abundance estimates in 2010 Draft NMFS Atlantic and Gulf of Mexico SAR; NA = Not Available

Negligible Impact and Small Numbers Analysis and Preliminary Determination

NMFS has defined “negligible impact” in 50 CFR 216.103 as “* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Neptune’s proposed port operation and maintenance and repair activities, and none are proposed to be authorized by NMFS. Additionally, animals in the area are not anticipated to incur any hearing impairment (*i.e.*, TTS, a Level B harassment, or PTS, a Level A [injury] harassment), as the modeling results for the SRV indicate a source level of 180 dB (rms), which is below the threshold used by NMFS for acoustic injury to marine mammals. All takes are anticipated to be by Level B behavioral harassment only. Certain species may have a behavioral reaction (*e.g.*, increased swim speed, avoidance of the area, etc.) to the sound emitted during the operations and maintenance activities. Table 1 in this document outlines the number of Level B harassment takes that are anticipated as a result of the proposed activities. These takes are anticipated to be of low intensity due to the low level of sound emitted by the activities themselves. The activities could occur year-round. However, operations are not anticipated to occur on successive days. Should repair or maintenance work be required, this could occur on successive days but likely only for 1–2 weeks. The activities do not occur in any critical habitat for the affected species, although there is some nearby for North Atlantic right

whales. Maintenance and repair activities will be conducted to avoid times of year when that species is most likely to be in the area.

While some of the species occur in the proposed project area year-round, some species only occur in the area during certain seasons. For example, sei whales are only anticipated in the area during the spring. Therefore, if shipments and/or maintenance/repair activities occur in other seasons, the likelihood of sei whales being affected is quite low. Additionally, any repairs that can be scheduled in advance will be scheduled to avoid the peak time that North Atlantic right whales occur in the area, which usually is during the early spring. North Atlantic right, humpback, and minke whales are not expected in the project area in the winter. During the winter, a large portion of the North Atlantic right whale population occurs in the southeastern U.S. calving grounds (*i.e.*, South Carolina, Georgia, and northern Florida). The fact that certain activities will occur during times when certain species are not commonly found in the area will help reduce the amount of Level B harassment for these species.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.*, 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.*, 2007). Operational activities are not anticipated to occur at the Port on consecutive days. Once Neptune is at full operations, SRV shipments would occur every 4–8 days, with thruster use needed for a couple of hours during each shipment. Therefore, Neptune will not be creating increased sound levels in the marine environment for several days at a time.

Of the 14 marine mammal species likely to occur in the area, four are listed as endangered under the ESA: North Atlantic right, humpback, fin, and sei whales. These four species, as well as the northern coastal stock of bottlenose dolphin, are also considered depleted under the MMPA. As stated previously in this document, the affected humpback and North Atlantic right whale populations have been increasing in recent years. However, there is insufficient data to determine population trends for the other depleted species in the proposed project area. There is currently no designated critical habitat or known reproductive areas for any of these species in or near the proposed project area. However, there are several well known North Atlantic right whale feeding grounds in the CCB and GSC. As mentioned previously, to the greatest extent practicable, all maintenance/repair work will be scheduled during the May 1 to November 30 time frame to avoid peak right whale feeding in these areas, which occur close to the Neptune Port. No mortality or injury is expected to occur and due to the nature, degree, and context of the Level B harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

The population estimates for the species that may be taken by harassment from the most recent U.S. Atlantic SARs were provided earlier in this document (*see* the “Description of Marine Mammals in the Area of the Specified Activity” section). From the most conservative estimates of both marine mammal densities in the project area and the size of the 120-dB ZOI, the maximum calculated number of individual marine mammals for each species that could potentially be harassed annually is small relative to the overall population sizes (12.8 percent for humpback whales, 9.1–9.6 percent for North Atlantic right whales, and no more than 4.4 percent of any other species).

As stated previously, NMFS’ practice has been to apply the 120 dB re 1 μ Pa

(rms) received level threshold for underwater continuous sound levels to determine whether take by Level B harassment occurs. However, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 15, 17, 19, and 21 in Southall *et al.* (2007) outline the numbers of low-frequency, mid-frequency, and high-frequency cetaceans and pinnipeds in water, respectively, reported as having behavioral responses to non-pulses in 10-dB received level increments. These tables illustrate, especially for cetaceans, that more intense observed behavioral responses did not occur until sounds were higher than 120 dB (rms). Many of the animals had no observable response at all when exposed to anthropogenic sound at levels of 120 dB (rms) or even higher.

The take estimates presented in this document are likely an overestimate of the actual number of animals that may be taken by Level B harassment in any given year. First, NMFS used the highest value SPUE for the season with the highest abundance of each species to determine relative abundance from the NCCOS (2006) report. However, the SPUE quantiles used in that report had very large ranges. For example, for humpback whales, NMFS used the SPUE quantile with a value of 0.1–11.8 but used 11.8 as the SPUE to determine density. In most cases, the highest value SPUE in any given quantile is many magnitudes larger than the minimum value in that particular quantile. Second, the estimates assume that repairs will be required every year, which may not be the case. For the reasons discussed in this section of the document (and elsewhere), the proposed take estimates presented by NMFS are likely an overestimate.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that operation, including repair and maintenance activities, of the Neptune Port will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from Neptune's proposed

activities will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

On January 12, 2007, NMFS concluded consultation with MARAD and USCG under section 7 of the ESA on the proposed construction and operation of the Neptune LNG facility and issued a Biological Opinion. The finding of that consultation was that the construction and operation of the Neptune LNG terminal may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green, or leatherback sea turtles.

On March 2, 2010, MARAD and USCG sent a letter to NMFS requesting reinitiation of the section 7 consultation. MARAD and USCG determined that certain routine planned operations and maintenance activities, inspections, surveys, and unplanned repair work on the Neptune Deepwater Port pipelines and flowlines, as well as any other Neptune Deepwater Port component (including buoys, risers/umbilicals, mooring systems, and sub-sea manifolds), may constitute a modification not previously considered in the 2007 Biological Opinion. Construction of the Port facility has been completed, and, therefore, is no longer part of the proposed action. On July 12, 2010, NMFS' Northeast Regional Office issued a Biological Opinion, which concludes that the operation of the Neptune LNG deepwater port, including required maintenance and repair work, is likely to adversely affect, but is not likely to jeopardize the continued existence of the North Atlantic right, humpback, fin, and sei whales. NMFS reached this conclusion after reviewing the best available information on the status of endangered and threatened species under NMFS jurisdiction, the environmental baseline for the action area, the effects of the action, and the cumulative effects in the action area. Although MARAD served as the lead Federal agency for the section 7

consultation, the Biological Opinion also considered the effects of permits issued by the Army Corps of Engineers, the Federal Energy Regulatory Commission, and the Environmental Protection Agency for various portions of the maintenance and operation of the Port and associated pipeline, as well as NMFS' issuance of authorizations to Neptune under the MMPA for the take of marine mammals incidental to Port operations and maintenance/repairs. NMFS has preliminarily determined that issuance of these regulations and subsequent LOAs will not have any impacts beyond those analyzed in the 2010 Biological Opinion. NMFS' Northeast Regional Office will issue an Incidental Take Statement upon issuance of the LOA.

National Environmental Policy Act (NEPA)

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the proposed Neptune LNG Deepwater Port (see ADDRESSES). A notice of availability of the Final EIS/EIR was published by MARAD on November 2, 2006 (71 FR 64606). The Final EIS/EIR provides detailed information on the proposed project facilities, construction methods, and analysis of potential impacts on marine mammals.

NMFS was a cooperating agency in the preparation of the Draft and Final EISs based on a Memorandum of Understanding related to the Licensing of Deepwater Ports entered into by the U.S. Department of Commerce along with 10 other government agencies. On June 3, 2008, NMFS adopted the USCG and MARAD FEIS and issued a separate Record of Decision for issuance of authorizations pursuant to sections 101(a)(5)(A) and (D) of the MMPA for the construction and operation of the Neptune LNG Port facility. NMFS is currently reviewing the FEIS to ensure that the analysis contained in that document accurately describes and analyzes the impacts to the human environment of NMFS' action of issuing an MMPA authorization for the operation and repair and maintenance of the Neptune Port. This review will be completed prior to the issuance of final regulations for this action.

Information Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning the request and the content of the proposed regulations to authorize the taking (see ADDRESSES). Prior to submitting comments, NMFS recommends readers review NMFS' responses to comments made previously

for this action (see 73 FR 33400, June 12, 2008; 74 FR 31926, July 6, 2009; 75 FR 41440, July 16, 2010).

Classification

OMB has determined that this proposed rule is not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Neptune LNG LLC is the only entity that would be subject to the requirements in these proposed regulations. Neptune is one of several companies at GDF SUEZ Energy North America (GSENA), which itself is a business division of GDF SUEZ Energy Europe & International. GSENA has more than 2,000 employees in North America alone. Therefore, it is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (*see ADDRESSES*).

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 14, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

2. Subpart R is added to part 217 to read as follows:

Subpart R—Taking of Marine Mammals Incidental to Operation and Maintenance of a Liquefied Natural Gas Facility Off Massachusetts

Sec.

217.170 Specified activity and specified geographical region.

217.171 Effective dates.

217.172 Permissible methods of taking.

217.173 Prohibitions.

217.174 Mitigation.

217.175 Requirements for monitoring and reporting.

217.176 Applications for Letters of Authorization.

217.177 Letters of Authorization.

217.178 Renewal of Letters of Authorization and Adaptive Management.

217.179 Modifications of Letters of Authorization.

Subpart R—Taking of Marine Mammals Incidental to Operation and Maintenance of a Liquefied Natural Gas Facility Off Massachusetts

§ 217.170 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Neptune LNG LLC (Neptune) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to commissioning and operation, including maintenance and repair activities, at the Neptune Deepwater Port (Port).

(b) The taking of marine mammals by Neptune may be authorized in a Letter of Authorization only if it occurs at the Neptune Deepwater Port within Outer Continental Shelf blocks NK 19-04 6525 and NK 19-04 6575, which are located at approximately 42°28'09" N. lat and 70°36'22" W. long.

§ 217.171 Effective dates.

Regulations in this subpart become effective upon issuance of the final rule.

§ 217.172 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 217.177 of this chapter, the Holder of the Letter of Authorization (hereinafter "Neptune") may incidentally, but not intentionally, take marine mammals within the area described in § 217.170(b), provided the activity is in

compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The incidental take of marine mammals under the activities identified in § 217.170(a) is limited to the following species and is limited to Level B Harassment:

(1) Mysticetes:

(i) North Atlantic right whale

(*Eubalaena glacialis*)—165 (an average of 33 annually)

(ii) Fin whale (*Balaenoptera physalus*)—195 (an average of 39 annually)

(iii) Humpback whale (*Megaptera novaeangliae*)—540 (an average of 108 annually)

(iv) Minke whale (*Balaenoptera acutorostrata*)—120 (an average of 24 annually)

(v) Sei whale (*Balaenoptera borealis*)—85 (an average of 17 annually)

(2) Odontocetes:

(i) Long-finned pilot whale (*Globicephala melas*)—835 (an average of 167 annually)

(ii) Atlantic white-sided dolphin (*Lagenorhynchus acutus*)—2,680 (an average of 536 annually)

(iii) Bottlenose dolphin (*Tursiops truncatus*)—50 (an average of 10 annually)

(iv) Common dolphin (*Delphinus delphis*)—100 (an average of 20 annually)

(v) Risso's dolphin (*Grampus griseus*)—100 (an average of 20 annually)

(vi) Killer whale (*Orcinus orca*)—100 (an average of 20 annually)

(vii) Harbor porpoise (*Phocoena phocoena*)—25 (an average of 5 annually)

(3) Pinnipeds:

(i) Harbor seal (*Phoca vitulina*)—75 (an average of 15 annually)

(ii) Gray seal (*Halichoerus grypus*)—75 (an average of 15 annually)

§ 217.173 Prohibitions.

Notwithstanding takings contemplated in § 217.170 and authorized by a Letter of Authorization issued under §§ 216.106 and 217.177, no person in connection with the activities described in § 217.170 may:

(a) Take any marine mammal not specified in § 217.172(b);

(b) Take any marine mammal specified in § 217.172(b) other than by incidental, unintentional Level B Harassment;

(c) Take a marine mammal specified in § 217.172(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 217.177.

§ 217.174 Mitigation.

(a) When conducting the activities identified in § 217.170(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 217.177 must be implemented. These mitigation measures include but are not limited to:

(1) Major Repairs (May 1–November 30):

(i) During repairs, if a marine mammal is detected within 0.5 mi (0.8 km) of the repair vessel, the vessel superintendent or on-deck supervisor shall be notified immediately. The vessel's crew will be put on a heightened state of alert. The marine mammal will be monitored constantly to determine if it is moving toward the repair area.

(ii) Repair vessels shall cease any movement in the area if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) from the operating repair vessel. Repair vessels shall cease any movement in the construction area if a right whale is sighted within or approaching to a distance of 500 yd (457 m) from the operating vessel. Vessels transiting the repair area, such as pipe haul barge tugs, shall also be required to maintain these separation distances.

(iii) Repair vessels shall cease all sound emitting activities if a marine mammal other than a right whale is sighted within or approaching to a distance of 100 yd (91 m) or if a right whale is sighted within or approaching to a distance of 500 yd (457 m), from the operating repair vessel. The back-calculated source level, based on the most conservative cylindrical model of acoustic energy spreading, is estimated to be 139 dB re 1 µPa.

(iv) Repair activities may resume after the marine mammal is positively reconfirmed outside the established zones (either 500 yd (457 m) or 100 yd (91 m), depending upon species).

(v) While under way, all repair vessels shall remain 500 yd (457 m) away from right whales and 100 yd (91 m) away from all other marine mammals, unless constrained by human safety concerns or navigational constraints.

(vi) All repair vessels 300 gross tons or greater must maintain a speed of 10 knots (18.5 km/hr) or less. Vessels less than 300 gross tons carrying supplies or crew between the shore and the repair site must contact the Mandatory Ship Reporting System, the U.S. Coast Guard (USCG), or the protected species

observers (PSOs) at the repair site before leaving shore for reports of recent right whale sightings or active Dynamic Management Areas (DMAs) and, consistent with navigation safety, restrict speeds to 10 knots (18.5 km/hr) or less within 5 mi (8 km) of any recent sighting location and within any existing DMA.

(vii) Vessels transiting through the Cape Cod Canal and Cape Cod Bay (CCB) between January 1 and May 15 must reduce speeds to 10 knots (18.5 km/hr) or less, follow the recommended routes charted by NOAA to reduce interactions between right whales and shipping traffic, and avoid aggregations of right whales in the eastern portion of CCB.

(2) Major Repairs (December 1–April 30): If unplanned/emergency repair activities cannot be conducted between May 1 and November 30, then Neptune shall implement the following mitigation measures in addition to those listed in § 217.174(a)(1)(i)–(vii):

(i) If on-board PSOs do not have at least 0.5-mi (0.8-km) visibility, they shall call for a shutdown of repair activities. If dive operations are in progress, then they shall be halted and divers brought on board until visibility is adequate to see a 0.5-mi (0.8-km) range. At the time of shutdown, the use of thrusters must be minimized to the lowest level needed to maintain personnel safety. If there are potential safety problems due to the shutdown, the captain must decide what operations can safely be shut down and shall document such activities in the data log.

(ii) Prior to leaving the dock to begin transit, the barge must contact one of the PSOs on watch to receive an update of sightings within the visual observation area. If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel shall hold for 30 minutes and again seek clearance to leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release and will grant clearance if no North Atlantic right whales have been sighted in the last 30 minutes in the visual observation area.

(iii) Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels who will have responsibilities for watching for marine mammals. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in the Letter of Authorization, sighting log requirements, and

procedures for reporting injured or dead marine mammals. These designated crew members shall be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew members shall sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch shall be recorded in the log book. Any whale sightings within 3,281 ft (1,000 m) of the vessel shall result in a high alert and slow speed of 4 knots (7.4 km/hr) or less. A sighting within 2,461 ft (750 m) shall result in idle speed and/or ceasing all movement.

(iv) The material barges and tugs used for repair work shall transit from the operations dock to the work sites during daylight hours, when possible, provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug shall be 5 knots (9.3 km/hr).

(v) Consistent with navigation safety, all repair vessels must maintain a speed of 10 knots (18.5 km/hr) or less during daylight hours. All vessels shall operate at 5 knots (9.3 km/hr) or less at all times within 3.1 mi (5 km) of the repair area.

(3) Speed Restrictions in Seasonal Management Areas (SMAs): Repair vessels and shuttle regasification vessels (SRVs) shall transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' final rule (73 FR 60173, October 10, 2008) to implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

(i) CCB SMA from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42°12' N. latitude;

(ii) Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30' N. 69°45' W.; thence to 42°30' N. 70°30' W.; thence to 42°12' N. 70°30' W.; thence to 42°12' N. 70°12' W.; thence to 42°04'56.5" N. 70°12' W.; thence along mean high water line and inshore limits of COLREGS limit to a latitude of 41°40' N.; thence due east to 41°41' N. 69°45' W.; thence back to starting point; and

(iii) Great South Channel (GSC) SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

42°30' N. 69°45' W.
41°40' N. 69°45' W.
41°00' N. 69°05' W.

42°09' N. 67°08'24" W.

42°30' N. 67°27' W.

42°30' N. 69°45' W.

(4) Additional Mitigation Measures:

(i) In approaching and departing from the Neptune Port, SRVs shall use the Boston Traffic Separation Scheme (TSS) starting and ending at the entrance to the GSC. Upon entering the TSS, the SRV shall go into a "heightened awareness" mode of operation.

(ii) In the event that a whale is visually observed within 0.6 mi (1 km) of the Port or a confirmed acoustic detection is reported on either of the two auto-detection buoys (ABs) closest to the Port, departing SRVs shall delay their departure from the Port, unless extraordinary circumstances, defined in the Marine Mammal Detection, Monitoring, and Response Plan (the Plan), require that the departure is not delayed. The departure delay shall continue until either the observed whale has been visually (during daylight hours) confirmed as more than 0.6 mi (1 km) from the Port or 30 minutes have passed without another confirmed detection either acoustically within the acoustic detection range of the two ABs closest to the Port or visually within 0.6 mi (1 km) from Neptune.

(iii) SRVs that are approaching or departing from the Port and are within the Area to be Avoided (ATBA) surrounding Neptune shall remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) away from all other visually detected whales unless extraordinary circumstances, as defined in Section 1.2 of the Plan, require that the vessel stay its course. The ATBA is defined in 33 CFR 150.940. It is the largest area of the Port marked on nautical charts, and it is enforceable by the USCG in accordance with the 150.900 regulations. The Vessel Master shall designate at least one lookout to be exclusively and continuously monitoring for the presence of marine mammals at all times while the SRV is approaching or departing Neptune.

(vi) Neptune shall ensure that other vessels providing support to Port operations during regasification activities that are approaching or departing from the Port and are within the ATBA shall be operated so as to remain at least 0.6 mi (1 km) away from any visually detected right whales and at least 100 yd (91 m) from all other visually detected whales.

(v) PSOs shall direct a moving vessel to slow to idle if a baleen whale is seen less than 0.6 mi (1 km) from the vessel.

(vi) Use of lights during repair or maintenance activities shall be limited

to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

(vii) Neptune must immediately suspend any repair and maintenance or operations activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the Port facility activities. Upon finding a dead or injured marine mammal, Neptune must contact NMFS, the Northeast Stranding and Disentanglement Program, and the USCG. NMFS will review the documentation submitted by the PSO and attempt to attribute a cause of death. Activities shall not resume until review and approval has been given by NMFS.

(5) Additional mitigation measures as contained in a Letter of Authorization issued under §§ 216.106 and 217.177.

(b) [Reserved]

§ 217.175 Requirements for monitoring and reporting.

(a) Visual Monitoring Program:

(1) Neptune shall employ two (2) PSOs (who must be approved by NMFS after a review of their qualifications) during maintenance- and repair-related activities on each vessel that has a dynamic positioning system. All PSOs must receive NMFS-approved PSO training and be approved in advance by NMFS after a review of their qualifications.

(2) Qualifications for these PSOs shall include direct field experience on a marine mammal observation vessel and/or aerial surveys in the Atlantic Ocean/ Gulf of Mexico.

(3) The PSOs (one primary and one secondary) are responsible for visually locating marine mammals at the ocean's surface and, to the extent possible, identifying the species. The primary PSO shall act as the identification specialist, and the secondary PSO shall serve as data recorder and also assist with identification. Both PSOs shall have responsibility for monitoring for the presence of marine mammals.

(4) The PSOs shall monitor the maintenance/repair area beginning at daybreak using the naked eye, hand-held binoculars, and/or power binoculars.

(5) The PSOs shall scan the ocean surface by eye for a minimum of 40 minutes every hour. All sightings must be recorded in marine mammal field sighting logs. Observations of marine mammals shall be identified to the

species or the lowest taxonomic level possible, and their relative position in relation to the vessel shall be recorded.

(6) While a SRV is navigating within the designated TSS, three people have lookout duties on or near the bridge of the ship including the SRV Master, the Officer-of-the-Watch, and the Helmsman on watch.

(7) In addition to standard watch procedures, while the SRV is within the ATBA and/or while actively engaging in the use of thrusters, an additional lookout shall be designated to exclusively and continuously monitor for marine mammals. Once the SRV is moored and regasification activities have begun, the vessel is no longer considered in "heightened awareness" status.

(8) At the conclusion of regasification activities, when the SRV is prepared to depart from the Port, the Master shall once again ensure that the responsibilities as defined in the Plan are carried out. All sightings of marine mammals by the designated lookout, individuals posted to navigational lookout duties, and/or any other crew member while the SRV is within the TSS, in transit to the ATBA, within the ATBA, and/or when actively engaging in the use of thrusters shall be immediately reported to the Officer-of-the-Watch who shall then alert the Master.

(b) Passive Acoustic Monitoring (PAM) Program:

(1) Neptune shall work with NMFS, Stellwagen Bank National Marine Sanctuary (SBNMS), and other scientists to monitor an array of passive acoustic buoys in the Boston TSS that meets the criteria specified in the recommendations developed by NOAA through consultation with the USCG under the National Marine Sanctuary Act (NMSA). The system shall provide near real-time information on the presence of vocalizing whales in the shipping lanes.

(2) Neptune shall work with NMFS, SBNMS, and other scientists to monitor the archival array of acoustic recording units (ARUs), or "pop-ups," around the Port that meets the criteria specified in the program developed by NOAA in consultation with the USCG under the NMSA. The ARUs shall remain in place for 5 years following initiation of operations to monitor the actual acoustic output of port operations and alert NOAA to any unanticipated adverse effects of port operations, such as large-scale abandonment of the area or greater acoustic impacts than predicted through modeling.

(3) Passive acoustic devices shall be actively monitored for detections by a NMFS-approved bioacoustic technician.

(4) **Repair Activity PAM Measures:** PAM, in addition to that required in this section of these regulations, is required for repair activities that occur between May 1 and November 30 in any given year in order to better detect right whales in the area of repair work and to collect additional data on the noise levels produced during repair and maintenance activities.

(i) Neptune shall work with NOAA (NMFS and SBNMS) to install and maintain a passive acoustic system to detect and provide early warnings for potential occurrence of right whales in the vicinity of the repair area. The number of passive acoustic detection buoys installed around the activity site shall be commensurate with the type and spatial extent of maintenance/repair work required, but must be sufficient to detect vocalizing right whales within the 120-dB impact zone.

(ii) Neptune shall provide NMFS with empirically measured source level data for all sources of noise associated with Port maintenance and repair activities. Measurements shall be carefully coordinated with noise-producing activities and should be collected from platforms that are as close as possible to noise producing activities.

(5) **SRV Regasification PAM Measures:** Source levels associated with dynamic positioning of SRVs at the buoys shall be estimated using empirical measurements collected from a platform positioned as close as practicable to thrusters while in use.

(c) Neptune must implement the following reporting requirements:

(1) Because the Port is within the Mandatory Ship Reporting Area (MSRA), all SRVs transiting to and from the Port must report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA must report their activities to WHALESNORTH. Any North Atlantic right whale sightings must be reported to the NMFS Sighting Advisory System.

(2) **Repair Work Reports.** (i) For any repair work associated with the pipeline lateral or other port components, Neptune shall notify the appropriate NOAA personnel as soon as practicable after it is determined that repair work must be conducted.

(ii) During maintenance and repair of the pipeline lateral or other port components, weekly status reports must be provided to NOAA. The weekly report must include data collected for each distinct marine mammal species

observed in the project area during the period of the repair activity. The weekly reports shall include the following:

(A) The location, time, and nature of the pipeline lateral activities;

(B) Whether the dynamic position (DP) system was operated and, if so, the number of thrusters used and the time and duration of DP operation;

(C) Marine mammals observed in the area (number, species, age group, and initial behavior);

(D) The distance of observed marine mammals from the repair activities;

(E) Observed marine mammal behaviors during the sighting;

(F) Whether any mitigation measures were implemented;

(G) Weather conditions (sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, etc.);

(H) Condition of the marine mammal observation (visibility and glare); and

(I) Details of passive acoustic detections and any action taken in response to those detections.

(iii) For all minor repair work, Neptune must notify NOAA regarding when and where the repair/maintenance work is to take place along with a tentative schedule and description of the work. Vessel crews shall record/document any marine mammal sightings during the work period.

(iv) At the conclusion of all minor repair work, Neptune shall provide NOAA with a report describing any marine mammal sightings, the type of work taking place when the sighting occurred, and any avoidance actions taken during the repair/maintenance work.

(3) **Incident Reports.** During all phases of project repair/maintenance activities and operation, sightings of any injured or dead marine mammals must be reported immediately to the Chief, Permits, Conservation and Education Division or staff member and the Northeast Stranding and Disentanglement Program, regardless of whether the injury or death is caused by project activities. If the injury or death was caused by a project vessel (e.g., SRV, support vessel, or construction vessel), the USCG must be notified immediately, and a full report must be provided to NMFS. Activities will not resume until review and approval has been given by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) The name and type of vessel involved;

(iii) The vessel's speed during the incident;

(iv) Description of the incident;

(v) Water depth;

(vi) Environmental conditions (e.g., wind speed and direction, sea state, cloud cover, and visibility);

(vii) Species identification or description of the animal;

(viii) The fate of the animal; and

(ix) Photographs or video footage of the animal (if equipment is available).

(4) **Annual Reports.** (i) An annual report on marine mammal monitoring and mitigation shall be submitted to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization), on August 1 of each year. The annual report shall cover the time period of July 1 through June 30 of each year of activity.

(ii) The annual report shall include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of Port operations and repair/maintenance activities. Description of marine mammal behavior, overall numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to operation and repair/maintenance activities shall also be included in the annual report. Additional information that shall be recorded during operations and repair/maintenance activities and contained in the reports include: date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel when a marine mammal is sighted, and whether thrusters were in use and, if so, how many at the time of the sighting.

(5) **Five-Year Comprehensive Report.**

(i) Neptune shall submit a draft comprehensive final report to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization), 180 days prior to the expiration of the regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four-and-a-half years of the LOA.

(ii) Neptune shall submit a revised final comprehensive technical report, including all monitoring results during the entire period of the LOAs, 90 days after the end of the period of effectiveness of the regulations to NMFS, Office of Protected Resources, and NMFS, Northeast Regional Office (specific contact information to be provided in Letter of Authorization).

§ 217.176 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. Citizen (as defined by § 216.103) conducting the activity identified in § 217.170(a) (*i.e.*, Neptune) must apply for and obtain either an initial Letter of Authorization in accordance with § 217.177 or a renewal under § 217.178.

(b) [Reserved]

§ 217.177 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 217.178 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 and § 217.177 for the activity identified in § 217.170(a) shall be renewed upon request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under § 217.176 will be undertaken and

that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS receives the monitoring reports required under § 217.175(c)(1)–(4); and

(3) NMFS determines that the mitigation, monitoring and reporting measures required under §§ 217.174 and 217.175 and the Letter of Authorization issued under §§ 216.106 and 217.177 were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If either a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 217.178 or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) *Adaptive Management*—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with Neptune regarding the practicability of the modifications) if

doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from Neptune's monitoring from the previous year;

(2) Results from general marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

§ 217.179 Modifications of Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization issued by NMFS, pursuant to §§ 216.106 and 217.177 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 217.178, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.172(b), a Letter of Authorization issued pursuant to §§ 216.106 and 217.177 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

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To designate the facility of the United States Postal Service located at 2 Massachusetts Avenue, NE, in Washington,

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